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Bulletin

Info Source

**Access to
Information Act**

Privacy Act

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**Access to
Information Act**

Privacy Act

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

**STATISTICAL
TABLES
2001-2002
ACCESS TO
INFORMATION**

Access to Information – 2001-2002
Disposition of Requests

Requests received		21,265
Requests completed	100.0%	21,275
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	32.6%	6,934
Some disclosed	40.4%	8,590
No records disclosed – excluded	0.4%	95
No records disclosed – exempted	2.7%	584
Transferred	1.5%	312
Treated informally	1.2%	260
Could not be processed	21.2%	4,500
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Access to Information – 2001-2002
Source of Requests

Requests received	100.0%	21,265
Business	43.4%	9,237
Public	33.6%	7,154
Media	12.3%	2,609
Organizations	10.0%	2,119
Academics	0.7%	146

Access to Information – 2001-2002
Ten Institutions Receiving Most Requests

Requests received by all institutions	100.0%	21,265
Citizenship and Immigration	30.8%	6,557
National Archives	9.4%	2,004
Health	7.0%	1,474
National Defence	6.4%	1,358
Canada Customs and Revenue Agency	4.8%	1,011
Public Works and Government Services	3.6%	763
Royal Canadian Mounted Police	2.8%	603
Environment	2.4%	508
Foreign Affairs and International Trade Canada	2.3%	496
Fisheries and Oceans	2.2%	460
Other Departments	28.3%	6,031

Access to Information – 2001-2002
Time Required to Complete Requests

Requests completed	100.0%	21,275
0 – 30 days	65.8%	13,987
31 – 60 days	15.2%	3,242
61 + days	19.0%	4,046

Access to Information – 2001-2002
Exemptions

Total exemptions	100.0%	20,235
Section 19 – Personal information	32.6%	6,599
Section 20 – Third party information	20.0%	4,045
Section 21 – Operations of government	16.5%	3,335
Section 16 – Law enforcement and investigations	7.6%	1,541
Section 15 – International affairs and defence	6.9%	1,403
Section 13 – Information obtained in confidence	5.4%	1,094
Section 23 – Solicitor-client privilege	4.3%	871
Section 14 – Federal-provincial affairs	2.3%	457
Section 18 – Economic interests of Canada	1.9%	375

Section 24 – Statutory prohibitions	1.8%	359
Section 26 – Information to be published	0.3%	64
Section 22 – Testing procedures	0.2%	50
Section 17 – Safety of individuals	0.2%	42

Access to Information – 2001-2002

Costs and Fees for Operations

Requests completed	21,275
Cost of operations	\$23,261,545
Cost per request completed	\$1,093
Fees collected	\$287,788
Fees collected per request completed	\$13.53
Fees waived	\$182,512
Fees waived per request completed	\$8.58

STATISTICAL TABLES
2001-2002
PRIVACY

Privacy – 2001-2002
Disposition of Requests

Requests received		36,137
Requests completed	100.0%	37,599
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	43.4%	16,353
Some disclosed	35.4%	13,306
No records disclosed – excluded	0.1%	30
No records disclosed – exempted	1.3%	475
Could not be processed	19.8%	7,435
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Privacy – 2001-2002
Five Institutions Receiving Most Requests

Requests received by all institutions	100.0%	36,137
Human Resources Development	19.5%	7,040
Correctional Service	14.3%	5,179
Citizenship and Immigration	12.9%	4,649
National Defence	12.3%	4,443
National Archives	11.0%	3,998
Other Departments	30.0%	10,828

Privacy – 2001-2002
Time Required to Complete Requests

Requests completed	100.0%	37,599
0 – 30 days	75.7%	28,472
31 – 60 days	13.1%	4,909
61 + days	11.2%	4,218

Privacy – 2001-2002
Exemptions

Total exemptions	100.0%	19,291
Section 26 – Information about another individual	60.5%	11,680
Section 22 – Law enforcement and investigation	20.0%	3,867
Section 19 – Personal information obtained in confidence	9.6%	1,846
Section 24 – Individuals sentenced for an offence	5.4%	1,039
Section 27 – Solicitor-client privilege	2.0%	385
Section 21 – International Affairs and defence	1.3%	256

Section 23 – Security clearances	0.6%	107
Section 18 – Exempt banks	0.3%	53
Section 25 – Safety of individuals	0.2%	38
Section 28 – Medical records	0.1%	18
Section 20 – Federal-provincial affairs	0.0%	2

Privacy – 2001-2002
Costs and Fees for Operations

Requests completed	37,599
Cost of operations	\$14,637,881
Cost per request completed	\$389

**STATISTICAL
TABLES
1983-2002
ACCESS TO
INFORMATION**

Access to Information – 1983-2002

Disposition of Requests

Requests received		207,162
Requests completed	100.0%	202,170
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	34.8%	70,357
Some disclosed	35.6%	71,895
No records disclosed – excluded	0.5%	1,149
No records disclosed – exempted	3.2%	6,380
Transferred	1.9%	3,828
Treated informally	4.5%	9,078
Could not be processed	19.5%	39,483
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Access to Information – 1983-2002

Time Required to Complete Requests

Requests completed	100.0%	202,170
0 – 30 days	58.6%	118,410
31 – 60 days	17.5%	35,438
61 + days	23.9%	48,322

Access to Information – 1983-2002
Costs and Fees for Operations

Requests completed	202,170
Cost of operations	\$187,183,806
Cost per request completed	\$926
Fees collected	\$2,857,571
Fees collected per request completed	\$14.13
Fees waived	\$1,234,488
Fees waived per request completed	\$6.11

STATISTICAL TABLES 1983-2002 PRIVACY

Privacy – 1983-2002
Disposition of Requests

Requests received		840,353
Requests completed	100.0%	835,711
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	55.2%	461,120
Some disclosed	28.9%	241,094
No records disclosed – excluded	0.0%	169
No records disclosed – exempted	0.8%	6,892
Could not be processed	15.1%	126,436
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Privacy – 1983-2002
Time Required to Complete Requests

Requests completed	100.0%	835,711
0 – 30 days	56.3%	470,862
31– 60 days	19.1%	159,703
61 + days	24.6%	205,146

Privacy – 1983-2002
Costs and Fees for Operations

Requests completed	835,711
Cost of operations	\$150,515,891
Cost per request completed	\$180

FEDERAL COURT CASES

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

**ATLANTIC PRUDENCE FUND CORPORATION AND OTHERS
V. MINISTER OF CITIZENSHIP AND IMMIGRATION
INDEXED AS: ATLANTIC PRUDENCE FUND CORP. V. CANADA
(MINISTER OF CITIZENSHIP AND IMMIGRATION)**

File Nos.: IMM- 2296-96, -2294-96, -2297-96
Reference(s): [2001] F.C.J. No. 556 (QL) (F.C.T.D.)
Date of Decision: April 12, 2001
Before: Hugessen J. (F.C.T.C.D)
Section(s) of ATIA / PA: Ss. 36 and 41 *Access to Information Act (ATIA)*

Abstract

- Motion for order directing Administrator of Court to send letter to Information Commissioner for purposes of expediting complaint
- Interference with Commissioner's function
- Misuse of Court's authority

Issue

Would it be appropriate for the Court to order the Administrator of the Court to send a letter to the Information Commissioner asking him to expedite a complaint filed by the applicants' solicitors?

Facts

The applicants brought a motion under Rule 369 (*Federal Court Rules, 1998*) to have the Case Management Judge direct the Administrator of the Federal Court to send a letter to the Information Commissioner asking him to expedite a complaint filed by the applicants' solicitors.

The applicants have brought applications for judicial review with regard to certain ministerial decisions made under the authority of the *Immigration Act*. They made a request pursuant to the *ATIA* for documents in response to which the Minister invoked certain exemptions to refuse disclosure or delete portions of some of the documents requested. They filed a complaint with the Commissioner regarding such refusals and deletions but the Commissioner advised that due to pressure of work, the matter would not be dealt with for some months. They submit that they need the documents and deleted portions for the purpose of pursuing their applications relating to the *Immigration Act* and seek the Court's aid in expediting matters in the Commissioner's office.

Decision

The motion was dismissed with costs.

Reasons

Leaving aside any questions as to its jurisdiction, the Court found that it would not be appropriate to issue such an order. The issuance of a letter from the Court Administrator would have no executory force and would not oblige the Commissioner to speed up the process or indeed to respond in any way. In addition, to do so would be to interfere with the independence of the Commissioner which is a necessary part of the latter's function and credibility. It would be a misuse of the Court's authority.

**WILLIAM DAVID NICHOL V. GEORGE RADWANSKI,
PRIVACY COMMISSIONER AND PRIVACY COMMISSION OF CANADA
INDEXED AS: NICHOL V. CANADA (PRIVACY COMMISSIONER)**

File No.: T-2341-00
Reference(s): [2001] F.C.J. No. 679 (QL) (F.C.T.D.)
Date of Decision: April 30, 2001
Before: Blanchard J. (F.C.T.D.)
Section(s) of *ATIA* / *PA*: S. 35(2) *Privacy Act* (*PA*)

Abstract

- *Mandamus* to compel Privacy Commissioner to provide letter of finding under subs. 35(2) *PA*
- Allegation of unreasonable amount of time to produce findings
- Jurisdiction of Court on motions to strike
- Mootness
- No time limit under *PA* for conducting investigation and issuing findings

Issues

- (1) Whether the Court has jurisdiction to strike out an application for *mandamus* to compel the Privacy Commissioner to provide a letter of finding pursuant to subs. 35(2) *Privacy Act*?
- (2) Whether the Court should exercise its discretion and review the alleged unreasonable amount of time for the Privacy Commissioner to produce the letter?

Facts

The applicant's notice of application seeks an order of *mandamus* compelling the Privacy Commissioner to supply the applicant with a letter of finding pursuant to subs. 35(2) of the *Privacy Act*. A letter of finding has been provided to the applicant around February 27, 2001. The Privacy Commissioner thereupon filed a motion to strike the application as being moot. The applicant argues that despite the fact that a letter of finding has been provided by the Privacy Commissioner, the Court should review the "unreasonable" amount of time required to produce the letter.

Decision

The motion to strike the application as moot is allowed and the notice of application seeking *mandamus* is struck without costs.

Reasons

Issue 1

The Court found that it had jurisdiction to strike out an application where the application is so clearly improper as to be bereft of any possibility of success, or where it is clear that the relief sought has become moot. The Court applied the comments made in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the leading case on the doctrine of mootness, where the Supreme Court stated at 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[...]

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

Having been supplied with the letter of finding from the Commissioner, the Court held that the applicant had received the very thing that he requested from the Court. Given that the remedy sought has been provided, the issue is now moot.

Issue 2

The Court found that there is no mention in the *Privacy Act* of specific time frames or time limits in which the Privacy Commissioner must conduct his investigation and issue a letter of finding. Given that the applicant had been provided with the remedy he sought, the Court held that it was not for the Court to determine whether the letter was provided in a reasonable amount of time. Therefore the Court declined to exercise its discretion to hear the moot issue in the case at bar.

**JEAN-GUY PELLAND V. HER MAJESTY THE QUEEN HEAD OF
STATE C.S.C. CANADA AND CORRECTIONAL SERVICE OF CANADA
AND RICHARD SAUVAGEAU
INDEXED AS: PELLAND V. CANADA (CORRECTIONAL SERVICE)**

File No.: T-2121-00

Reference(s): [2001] F.C.J. No. 695 (QL) (F.C.T.D.)

Date of Decision: May 7, 2001

Before: Denault J.A. (F.C.T.D.)

Section(s) of the *ATIA / PA*: S. 41 *Access to Information Act (ATIA)*

Abstract

- Jurisdiction of the Federal Court
- Motion to order CSC to give the plaintiff his file
- File subject of a request under the *ATIA*
- Motion is premature

Issue

Whether the Federal Court has jurisdiction to issue an order obliging the CSC to give the plaintiff a file that he requested under the *Access to Information Act* and order that it be entered in the Court file.

Facts

The plaintiff, an inmate at the federal penitentiary in Drummondville, is claiming the sum of \$9,462,500 for various damages that he allegedly suffered as a result of “false...statutory declarations” made by correctional officers on or about June 22, 1995, and through testimony given in criminal court by defendant Sauvageau on January 26, 2000.

There are two motions before the Court.¹ The first, presented by the plaintiff, is to obtain (a) a stay of proceedings until he obtains his preventive security file from the Correctional Service of Canada through the *Access to Information Act*; (b) an order by the Court obliging the Correctional Service of Canada to release his “complete” preventive security file, that is “from the time he was admitted on or about October 18, 1975, to the present day;” (c) the Court’s permission to enter that file into evidence and, if necessary, an extension of time until the order is granted him.

Decision

The plaintiff’s motion is dismissed.

Reasons

With respect to the motion to issue an order obliging the Correctional Service of Canada to give the plaintiff the file that he requested under the *Access to Information Act*, the Court finds that the motion is at the very least premature and could not possibly be granted under the present proceedings. The Court affirms that it is first the prerogative of those responsible for the administration of the *Access to Information Act* to decide whether to comply with the request, leaving open, if necessary, redress in the manner prescribed by the law. The request to enter the file into evidence is also premature. Moreover, the motion by the plaintiff does not show that there is any reason in this instance to stay the proceedings under subs. 50(1) of the *Federal Court Act*.

¹ The second motion, presented by the defendants, was to obtain a summary judgment dismissing the major part of the plaintiff’s claim. That motion was granted, the cause of action for that part of the claim being statute barred.

**JACQUES WHITFORD ENVIRONMENT LTD. V. MINISTER OF NATIONAL DEFENCE
INDEXED AS: JACQUES WHITFORD ENVIRONMENT LTD. V. CANADA
(MINISTER OF NATIONAL DEFENCE)**

File No.: T-124-00

Reference(s): [2001] F.C.J. No. 828 (QL) (F.C.T.D.)

Date of Decision: May 30, 2001

Before: O’Keefe J. (F.C.T.D.)

Section(s) of *ATIA / PA*: Ss. 20(1)(b) (c), 25 and 44 *Access to Information Act (ATIA)*

Abstract

- Third party information
- Intention to disclose third party’s unsolicited proposal
- S. 44 judicial review
- Criteria for application of paras. 20(1)(b) and (c) *ATIA*
- Confidentiality of information; objective standard
- Mere assertions not meeting “reasonable expectation of probable harm” test under para. 20(1)(c)

Issues

(1) Is the unsolicited proposal information exempt from disclosure under para. 20(1)(b) of the Act as constituting information that is financial, commercial, scientific or technical in nature; as well as confidential; that was supplied to a government institution by the applicant; and that has been consistently treated as such by the third party?

- (2) Is there a reasonable probability of material financial loss to the applicant or prejudice to the competitive position of the applicant pursuant to para. 20(1)(c) of the Act if the unsolicited proposal is released?
- (3) If the Court should conclude that the whole of the unsolicited proposal is not exempt from disclosure, should some of the information contained in the proposal be severed prior to disclosure?

Facts

This is an application pursuant to s. 44 of the *Access to Information Act*, for review of a decision of the Department of National Defence (“DND”) to disclose certain records pertaining to the applicant and the ISO 14000/1 accreditation of a military flight training monitoring program at 5 Wing Goose Bay.

In 1998, the applicant, Jacques Whitford Environment Limited (JWEL), submitted an unsolicited proposal to DND in response to a need that the applicant perceived DND might have, even though that perceived need had not been the subject of a public call for tenders. Among other things, the unsolicited proposal contained a description of a methodology to be employed by DND.

Ultimately, the unsolicited proposal was not accepted by DND although DND did issue a call for abbreviated proposals in relation to work of a similar scope to that suggested in the unsolicited proposal.

A few months later, DND received a request for all documents related to “DND efforts to obtain ISO 14000/1 accreditation regarding military flight training monitoring program at 5 Wing Goose Bay.” Upon review of the records, DND determined that these records contained what was believed to be “third party information” which pertained to the applicant. The applicant was informed of the request and of DND’s intention to exempt from disclosure the unsolicited proposal pursuant to paras. 20(1)(b) and (c) of the Act. The applicant responded by requesting that the unsolicited proposal not be disclosed.

After initially agreeing with the applicant that the unsolicited proposal should not be disclosed, DND took the position that the information contained in the unsolicited proposal was not exempt from disclosure and, as a consequence, the applicant brought the present application.

The applicant is of the view that disclosure of the records is precluded by para. 20(1)(b) of the Act because they contain financial, commercial, scientific or technical information that is confidential information supplied to the Department of National Defence by the applicant and that is treated consistently in a confidential basis by the applicant, and by para. 20(1)(c) of the Act because their disclosure could reasonably be expected to result in material financial loss or prejudice the competitive position of the applicant.

Decision

The application for judicial review was allowed in part. The information contained in the unsolicited proposal, with the exception of certain paragraphs, met the requirements of para. 20(1)(b) of the Act and accordingly was not to be disclosed. The unsolicited proposal did not meet the requirements of para. 20(1)(c) of the Act. The paragraphs that did not fall within the para. 20(1)(b) exemption were ordered disclosed pursuant to s. 25 of the Act. Any personal information covered by subs.19(1) of the Act was not to be disclosed.

Reasons

Issue 1

The Court cited with approval *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.) wherein MacKay, J. noted that the requested records must contain four criteria in order to be exempt from disclosure under para. 20(1)(b) of the Act, namely the information contained in the requested records must be: (1) financial, commercial, scientific or technical information; (2) confidential information; (3) supplied to a government institution by a third party; and (4) treated consistently in a confidential manner by the third party.

The parties agreed, at the hearing, that the requested document met criteria 1, 3 and 4 as outlined in *Air Atonabee, supra*. The Court concurred that the document met these three criteria. The only question at issue was whether the document was confidential information as per the second criteria set forth by MacKay, J. above. The Court reiterated the remarks of MacKay, J. in *Air Atonabee, supra* at page 208, which read as follows:

The second requirement under subsection 20(1)(b), that the information be confidential, has been dealt with in a number of decisions. These establish that the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated [...] It is not sufficient that the third party state, without further evidence, that it is confidential (see, e.g., *Merck Frosst Canada Inc., supra*; *Re Noel and Great Lakes Pilotage Authority Ltd. et al. (1987)*, 45 D.L.R. (4th) 127 (F.C.T.D.)). Information has not been held to be confidential, even if the third party considered it so, where it has been available to the public from some other source (*Canada Packers Inc. v. Minister of Agriculture*, [1988] 1 F.C. 483 (T.D.) ...or where it has been available at an earlier time or in another form from government (*Canada Packers Inc., supra*; *Merck Frosst Canada Inc., supra*). Information is not confidential where it could be obtained by observation albeit with more effort by the requestor (*Noel, supra*) [...]

The applicant's affidavit states that "the unsolicited proposal was submitted on a confidential basis to the DND. A significant portion of the information [...] has consistently been handled in a confidential manner in the normal course of its business [and] is not publically [sic] available from any other source."

Moreover, the Court noted that the evidence of the respondent established that the respondent initially intended to exclude the document in question from the request for information. The Court found that there had been no evidence submitted to refute the applicant's evidence that it handles such information in a confidential manner in the normal course of its business and that the information is not publicly available from any other source.

The Court was satisfied that the applicant met all of the criteria for confidential information, as outlined by MacKay, J. in *Air Atonabee, supra*, subject to the exceptions listed in its discussion of severance. The Court found that the confidential information in the document was not available from sources otherwise accessible by the public, nor could it be obtained by observation or independent study by a member of the public acting on his or her own. The confidential portion of the information in the document originated and was communicated in a reasonable expectation of confidence that it would not be disclosed. In the Court's view, the information was communicated in a relationship that is not contrary to the public interest, and a relationship that is fostered for public benefit by confidential communication. Therefore, the Court held that the information contained in the unsolicited proposal, with the exceptions of the severed portion of the document, met the requirements of para. 20(1)(b) of the Act and thus, was not to be disclosed.

Issue 2

The Court was not satisfied that the evidence submitted by the applicant allowed the unsolicited proposal to qualify for non-disclosure under para. 20(1)(c) of the Act. After reviewing the applicant's affidavit the Court stated that it did not find anything but bald assertions that the applicant would be put at a competitive disadvantage and that it would suffer incalculable damages.

Issue 3

The Court gave consideration to severing portions of the documents that did not contain confidential information pursuant to para. 20(1)(b). It took guidance from Strayer, J.'s decision in *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sport)*, [1989] 2 F.C. 480 (F.C.T.D.) at pages 488 to 489.

The Court also held that the personal information covered by subs. 19(1) of the Act would not be disclosed.

**INFORMATION COMMISSIONER OF CANADA V. EXECUTIVE DIRECTOR OF THE
CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD
INDEXED AS: CANADA (INFORMATION COMMISSIONER) V. CANADA (CANADIAN
TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD)**

File No.: T-465-01

Reference(s): [2001] F.C.J. No. 978 (QL) (F.C.T.D.)

Date of Decision: June 14, 2001

Before: Dubé J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 19 and 27 *Access to Information Act (ATIA)*

Abstract

- Application by NAV CANADA to be added as respondent to the application for judicial review or, in the alternative, as intervenor
- Court's exercise of discretion to join a respondent in an application for judicial review – five criteria

Issue

Whether NAV CANADA should be added as a respondent to the application for judicial review filed under the *ATIA* or, in the alternative, as intervenor.

Facts

By this application under Rules 303(1)(a) and 104(1)(b) of the *Federal Court Rules, 1998*, NAV CANADA requests an order adding it as a respondent to the judicial review application or, in the alternative, to be added as an intervenor pursuant to Rule 109 with the right to file evidence, participate in cross-examinations, file written representations and make oral arguments.

The application for judicial review brought by the Information Commissioner turns on the Transportation Safety Board's refusal to release certain audiotapes of conversations between NAV CANADA's air traffic controllers and a particular flight crew relating to an air crash near Clarenceville, Newfoundland, on May 19, 1998, involving a Kelher Airways aircraft. The application alleges that the Transportation Safety Board erred in its application of s. 19 of the *ATIA*. The audiotapes in question were provided to the Transportation Safety Board by NAV CANADA and contain the voices of NAV CANADA employees while acting in the course of their employment.

Since November 1, 1996, NAV CANADA, a private corporation, has been the primary provider of civil air navigation services within Canada and within international airspace for which the responsibility has been delegated to Canada. NAV CANADA makes and records conversations involving its traffic controllers and flight service specialists and crews of air flights.

Decision

The application is granted and the Court orders that NAV CANADA be added as a respondent to the application for judicial review.

Reasons

Rule 303(1)(a) of the *Federal Court Rules, 1998* provides that every person directly affected by an order sought in an application shall be named as respondent to the application. Rule 104(1)(b) stipulates that the Court may add a person as a party, at any time, where the person ought to have been joined as a party, or where the person's presence before the Court is necessary to ensure that all matters in dispute may be effectually and completely determined.

The Court applied the five criteria elaborated in *Apotex Inc. v. Canada (Attorney General)* (1994), 79 F.T.R. 235 (F.C.T.D.) with regard to the Court's exercise of discretion to join a respondent in an application for judicial review and ruled as follows:

1. As to the status of the case, the matter is not so far advanced as to rule out the addition of a second respondent (no cross-examination has been held as yet);
2. As to the impact of the decision, the parties, in addition to the pilot of the flight, will be NAV CANADA and its employees, i.e. the air traffic controllers whose voices are on the tape;
3. As to the nature of the rights asserted by the parties, the disclosure of the information may affect NAV CANADA's relations with its own employees and possibly the general public;
4. The nature of the evidence that NAV CANADA is in position to adduce, because of its technical expertise in the matter, can assist the Court in reaching its decision;
5. The existing parties do not have the ability that NAV CANADA offers to provide some of the relevant evidence which NAV CANADA is enthusiastic to provide.

As a party respondent, NAV CANADA will be allowed to make full representations on relevant issues, which representations it did not make as it was not issued a s. 27 ATIA notice.

The Court held that, for the purpose of this application, it was sufficient to decide whether NAV CANADA is directly affected by the order sought in the application for judicial review and, in the Court's view, it was.

KEN RUBIN V. THE MINISTER OF HEALTH
INDEXED AS: RUBIN V. CANADA (MINISTER OF HEALTH)

File No.: T-2408-98

Reference(s): [2001] F.C.J. No. 1298 (QL) (F.C.T.D.)

Date of Decision: August 21, 2001

Before: Nadon J.

Section(s) of *ATIA* / *PA*: Ss. 10(1)(b), 13, 20(1)(b) (c), 20(6) *Access to Information Act (ATIA)*

Abstract

- Third party information
- Whether discretion in s. 20(6) properly exercised
- Reliance upon additional exemption subsequent to investigation

Issues

- (1) Was the respondent justified in withholding certain portions of the requested report pursuant to paras. 20(1)(b) and (c) of the *ATIA*?
- (2) Was the respondent's discretion under subs. 20(6) of the *ATIA* properly exercised?
- (3) Was the respondent justified in withholding portions of the requested Report pursuant to para. 13(1)(a) of the *ATIA*?

Facts

The applicant brought an application for judicial review pursuant to s. 41 of the *ATIA* after he requested from the respondent, and was denied, parts of a special Health Canada review on the safety of calcium channel blockers (CCB drugs).

In 1997, the applicant requested a report from the respondent that contained a review of the safety of CCB drugs (the “Report”). The respondent provided the applicant with a first edited version of the Report that had been created for public release but withheld other portions pursuant to paras. 20(1)(b) and (c) of the Act. The applicant complained to the Information Commissioner. As a result, the respondent undertook another review of the Report and later provided the applicant with a second edited version. It continued to withhold some information pursuant to paras. 20(1)(b) and (c) of the Act. By letter dated some two months after the Information Commissioner’s investigation was over, the respondent informed the applicant that it had also relied on s. 13 of the Act (information obtained in confidence from the government of a foreign state) to exempt some of the information. The reference to s. 13 of the Act had been omitted in the earlier letter. The s. 13 exemption was not part of the Information Commissioner’s investigation.

The Information Commissioner concluded that the para. 20(1)(b) exemption had been properly applied and the discretion contained in subs. 20(6) had been properly exercised.

Decision

The application was dismissed with costs. The respondent was justified in refusing disclosure pursuant to para. 20(1)(b) of the Act and the exercise of its discretion not to disclose the information pursuant to subs. 20(6) of the Act was proper. However, the respondent was precluded from relying on s. 13 of the Act.

Reasons

Issue 1

The Court held that the respondent had fulfilled the criteria established in *Air Atonabee Limited v Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.) in order for the information in the Report to be exempt from

disclosure under para. 20(1)(b) of the Act. It consisted of confidential scientific studies of third parties that had been supplied to the government and had been consistently treated in a confidential manner by both parties. The respondent does not have an obligation to search all publications, journals, etc. to verify if the information was released in any shape or form to the public, while the sources of the information, the third parties, maintain that it is still confidential.

In view of its conclusion regarding para. 20(1)(b), the Court held that it did not need to address the submissions regarding para. 20(1)(c).

Issue 2

The Court held that the respondent has the discretion under subs. 20(6) of the Act to disclose the information if it is in the interest of the public. However, it does not have an obligation or duty to do so. The Court must examine whether the discretion was exercised in good faith, rather than conduct a *de novo* review of the exercise of the discretion. In this case there was no evidence of bad faith on the part of the respondent and the exercise of the respondent's discretion was proper.

Issue 3

Since the respondent had dropped its reliance on s. 13 of the Act at the time of the Commissioner's investigation, it could not, a few months later, suddenly invoke that section again. Paragraph 10(1)(b) of the Act clearly states that the provisions relied upon by the respondent must be included in the notice to the applicant. Therefore, the respondent is precluded from relying on s. 13 of the Act in this judicial review.

Comments

The applicant is appealing this decision.

3430901 CANADA INC. AND TELEZONE INC. V. THE MINISTER OF INDUSTRY CANADA; INFORMATION COMMISSIONER OF CANADA V. MINISTER OF INDUSTRY CANADA
INDEXED AS: 3430901 CANADA INC. V. CANADA (MINISTER OF INDUSTRY)

File Nos.: A-824-99; A-832-99

References: [2002] 1 F.C. 421 (C.A.)

Date of Decision: August 29, 2001

Before Evans, Strayer, Décary JJ.A. (F.C.A.)

Section(s) of *ATIA / PA*: Ss. 21(1), (2), 48 and 49 *Access to Information Act (ATIA)*

Abstract

- Meaning of “advice” and “recommendations”
- Documents included in para. 21(1)(a) ATIA
- Exercise of Minister’s discretion concerning non-release

Issues

- (1) Were the weightings initially assigned to the criteria on which the discretionary award of the licences was based, properly characterized as “advice and recommendations”, or as the factual basis of the conclusions of the officials who assessed the applications?
- (2) When the Minister rejected some of those weightings and directed a reassessment in the light of the weightings approved by the Minister, did those final weightings cease to be “advice and recommendations” and become, instead, the basis or reasons for the decision?

(3) If the weightings were properly characterized at all material times as “advice and recommendations”, did the head of the institution lawfully exercise his discretion under para. 21(1)(a) ATIA?

Facts

This is an appeal from a decision of the Trial Division ((1999), 177 F.T.R. 161) on a s. 41 *ATIA* application for judicial review of the refusal of a delegate of the Minister of Industry Canada to disclose certain information requested in 1996. The Information Commissioner made an application under s. 42 for judicial review of this refusal.

In 1995, the Minister invited licence applications from parties interested in providing personal communication services at the 2 GHz frequency range. Six licences were said to be available, three for the 30 MHz block and three for the 10 MHz block. The Minister reserved the right to issue less than that number of licences. The applications were reviewed in detail by an 18-member committee called the “working group,” which analyzed the applications against certain evaluation criteria and made its findings known to another committee called the “selection panel.” The selection panel consisted of 12 individuals, including senior managers from the spectrum and telecommunications program of Industry Canada. Its function was to rank the applications in accordance with selection criteria and to provide recommendations to the Minister as to which applications should be awarded a licence. There were communications and meetings between the selection panel and the Minister. Later, the Minister announced that only four licences would be issued, two in each block. Telezone was not issued a licence.

A member of the working group and his staff developed a particular system of percentage weighting for the various factors, based upon the policy objectives they had identified. Those percentages and discussions of the policy considerations appear on various documents that were circulated to the

working group, the selection panel or the Minister. An initial assessment of the applications was done by the working group, based on the original percentage weighting.

After discussions with the Minister, the percentage weightings were changed on the instructions of the Minister to reflect different priorities. The applications were reassessed on the basis of the revised weighting, and the final assessments were communicated to the Minister. The final percentage weighting given to the various criteria formed the foundation for differentiating the applications, and thus affected the Minister's decision on which applicants would be issued licences.

In 1996, Telezone applied under the *ATIA* to compel the disclosure of documents relating to the Minister's decision. The response was not satisfactory to Telezone, which complained to the Information Commissioner (IC). The IC investigated. There were further disclosures in the course of the investigation. These disclosures did not satisfy Telezone nor the IC. The IC issued a report recommending further disclosure. The Minister's delegate disagreed with the IC's recommendation and continued to withhold certain documents. Both Telezone and the Information Commissioner applied for judicial review. However, those were not parallel applications since some of the information Telezone sought from those documents was not included in the IC's application. The Trial Division dismissed both applications.

On appeal, the appellants reduced the number of documents they were requesting. On the other side, counsel for the Minister was able to narrow the issues by relying only on para. 21(1)(a).

Decision

The Court dismissed both appeals with costs.

Reasons

Issue 1: advice and recommendations

The Court stated that statutory exemptions need to be interpreted in light of both the purpose of the Act and the countervailing values that underlie the exemptions relied on, especially, in regard to para. 21(1)(a), the preservation of a full and frank flow of interchanges among public officials participating in the decision-making process.

In the Court's opinion, the Minister's interpretation of the scope of the statutory exemption to the duty to disclose was reviewable on a standard of correctness. The FCA referred to *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

The question now is: Were the weightings initially assigned to the criteria on which the discretionary award of the licences was based, properly characterised as "advice and recommendations", or as the factual basis of the conclusions of the officials who assessed the applications?

The Court expressed the opinion that by exempting "advice and recommendations" from disclosure, Parliament must have intended the former to have a broader meaning than the latter, otherwise it would be redundant.

The Court offered the following definition of the word "advice":

I would include within the word "advice", an expression of opinion on policy-related matters, but exclude information of a largely factual nature [...]

Considering each type of documents in issue, the Court opined that:

a) Weightings of the working group

The content of the weightings of the working group is predominantly normative rather than factual, bringing them under the rationales underlying para. 21(1)(a). In the Court's view, this conclusion is not affected by the fact that the working group was implicitly, rather than expressly, advising the Minister.

The Minister was correct to treat as falling within para. 21(1)(a) any records or parts of records emanating from the working group and selection panel that contain the percentages ascribed by the working group to the various evaluative criteria, the descriptions of the criteria that have not been disclosed by the Minister, and the numerical scoring of Telezone's application.

b) Uncommunicated advice

A record otherwise falling within the category of "advice", still contains advice even if it was only intended to assist participants in the decision-making process to formulate the advice or recommendations that they would ultimately give to the final decision-maker. The Court found that records containing personal notes made by a member of the working group in preparation for the meeting of the group contained "advice" as they formed an integral part of the process by which policy advice was developed.

c) Inconclusive advice

By using both words "advice and recommendations" in para. 21(1)(a), Parliament clearly indicated that records that do not contain "recommendations" may still fall within the exemption.

Therefore, a document to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, containing policy options, implicitly contains the writer's view of what the Minister should do or

how the Minister should view a matter. All are normative in nature and are an integral part of an institutional decision-making process. Paragraph 21(1)(a) could be available.

d) Final weightings

The final weightings were prepared for the purpose of assisting the Minister to make a decision and this information is undoubtedly “advice” pursuant to para. 21(1)(a).

Issue 2: interpretation and application of para. 21(2)(a)

When the Minister rejected some of those weightings and directed a reassessment in the light of the weightings approved by the Minister, did those final weightings cease to be “advice and recommendations” and become, instead, the basis or reasons for the decision?

In para. 21(2)(a), Parliament has expressly provided that a record otherwise falling within para. 21(1)(a) must be disclosed if it contains a statement of reasons for a decision that affects the rights of a person. It is not open to the courts to expand the scope of para. 21(2)(a) by applying it to a document that contains a statement of the reasons for a discretionary decision that does not affect the rights of a person.

Telezone had no legal right to be awarded a discretionary licence, it therefore can not be said that it had any rights that were adversely affected by the decision.

The Court added further that para. 21(2)(a) does not remove from the ambit of para. 21(1)(a) a record otherwise exempt from disclosure because it contains “advice”.

The information was prepared for the purpose of assisting the Minister to make a decision and was advice pursuant to para. 21(1)(a). The Court confirmed the position of the Trial Division.

Issue 3: Review and remedy of exercise of Minister's discretion

The Court of Appeal, relying on *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, agreed with the Trial Division's conclusion that the burden of proof was on the appellants to establish that the Minister had failed to exercise according to law the statutory discretion to disclose the documents containing advice and recommendations within the meaning of para. 21(1)(a).

Since the *ATIA* leaves the disclosure of records falling within para. 21(1)(a) to the discretion of the Minister, and imposes no express limitations on its exercise, it is not for the Court to substitute its view for that of the Minister on how the discretion should be exercised. The Court referred to *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D.), *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147 (F.C.T.D.) and *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

However, the Court relying on *Baker (supra)* considers the Minister's exercise of discretion under para. 21(1)(a) subject to review for bad faith, breach of natural justice, relevancy of the considerations relied on by the decision-maker as these three criteria are described in the Supreme Court decision in *Dagg* but as well for unreasonableness simpliciter.

The Court before examining the reasons for the Minister's refusal and the sufficiency of these reasons, said the following:

I am willing to assume for the purpose of this appeal, but need not decide, that Industry Canada was obliged to provide reasons for its discretionary refusal to disclose the documents requested by Telezone and the Information Commissioner. The question is whether that duty has been discharged.

In view of the flexibility of the content of the duty to provide reasons that the Court mandated in *Baker (supra)*, the FCA accepted internal documents of Industry Canada as well as documents written by departmental officers to Telezone and the IC as reasons for the refusal.

Finally, the Court is prepared to infer from the materials and from ongoing disclosures that the respondent balanced the competing interests. The reasons for the refusal to disclose the exempt documents were adequate and the appellants had failed to establish that the Minister's discretion has been exercised unlawfully.

Comments

- (1) Leave to appeal to the Supreme Court of Canada was denied: [2001] S.C.C.A. No. 537 (QL), June 13, 2002.
- (2) The reasons for decision in the instant case were also applicable to the disposition of the appeal in *Canada (Information Commissioner) v. Canada (Minister of Industry)*, A-43-00 ((2001), 14 C.P.R. (4th) 484 (F.C.A.)). Leave to appeal to the Supreme Court of Canada was denied: [2001] S.C.C.A. No. 536 (QL), June 13, 2002.

**PRICEWATERHOUSECOOPERS, LLP V. MINISTER OF CANADIAN HERITAGE
INDEXED AS: PRICEWATERHOUSECOOPERS, LLP V. CANADA
(MINISTER OF CANADIAN HERITAGE)**

File No.: T-1785-99
Reference(s): [2001] F.C.J. No. 1439 (QL) (F.C.T.D.)
Date of Decision: September 20, 2001
Before: Campbell J. (F.C.T.D.)
Section(s) of *ATIA* / *PA*: Ss. 20(1), 44 *Access to Information Act (ATIA)*

Abstract

- Third party information
- Trade secrets; technical and commercial information
- Confidentiality clause
- Proprietary methodologies and analysis used in preparation of reports
- Whether reports of a “technical nature” so as to meet definition of trade secret

Issue

Whether the two reports produced by the applicant are records that fall within paras. 20(1)(a), (b), and (c) of the *ATIA*.

Facts

In 1998, Canadian Heritage contracted the applicant’s services for the purpose of reviewing, analysing and recommending changes to its documents being used to contract out or “outsource” elements of its work. The applicant claimed that the concern for confidentiality of the two reports produced was a fundamental feature of the relationship. In carrying out the contract, the

applicant used such proprietary tools as its “Alternate Service Delivery” (“ASD”) methodology developed by it over a period of time.

The applicant brought an application pursuant to s. 44 of the *ATIA* after Canadian Heritage made the decision to disclose the two reports as a result of an access request. The applicant claimed that the two reports were records to which subs. 20(1) of the *ATIA* applies. In support of its application, Price Waterhouse filed two affidavits outlining, in detail, the nature of the proprietary information involved and how the disclosure of such information would prejudice its competitive position. It claimed that disclosure of the reports would allow a competitor to reverse-engineer or work deductively to determine the means and analysis Price Waterhouse uses in its ASD assignments. Competitors could then improve or modify their own methodology based on Price Waterhouse’s approach. Included in the evidence were copies of each of the reports in question which made it clear that the information contained therein was of a confidential technical nature, that it was supplied to Canadian Heritage on that basis and that the disclosure of that information could harm the applicant’s competitive position and/or materially interfere with ongoing or future contract/tender negotiations.

Decision

The application was allowed with costs to be determined. Canadian Heritage was ordered not to disclose the two reports.

Reasons

Paragraph 20(1)(a)

The Court applied the definition of “trade secret” as set out by Strayer J. in *Société Gamma Inc. v. Canada (Department of Secretary of State)* (1994), 56 C.P.R. (3d) 58 (F.C.T.D.) at p. 62:

I am of the view that a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such particular value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.

Campbell J. held that the work product was capable of proving the methodology and that, therefore, they are one and the same. It was also held that the work product was of a “technical nature” within Strayer J.’s definition, above; it was guarded very closely by the applicant and regarded as of such a unique and peculiar quality that its mere disclosure could be presumed to cause economic harm to the applicant. Campbell J. therefore concluded that the reports in question contained trade secrets.

Paragraph 20(1)(b)

Relying on the findings made with respect to para. 20(1)(a), Campbell J. held that the reports in question contained “technical information”; the work was done as part of a commercial enterprise and therefore can be properly considered as containing “commercial information”; and, finally, that such information had been consistently treated in a confidential manner within the meaning set out in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.).

Campbell J. also determined that in deciding whether the fostering of a confidential relationship between the government and the third party is for the “public benefit” (see criteria set out in *Air Atonabee, supra*), what is required to be established is only the type and workings of the relationship that exists. In this case, such a relationship produced confidential advice and guidance with respect to the public’s business in order to ensure more beneficial governmental management very much to the public’s benefit.

Paragraph 20(1)(c)

Campbell J. held that the criteria for proof of “material financial loss” set out in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (F.C.T.D.) had been met, that is, proof of “a reasonable expectation of probable harm”.

Comments

The Minister of Canadian Heritage has appealed this decision.

**INFORMATION COMMISSIONER OF CANADA V. CHAIRMAN OF
THE CANADIAN CULTURAL PROPERTY EXPORT REVIEW BOARD
INDEXED AS: CANADA (INFORMATION COMMISSIONER) V. CANADA
(CULTURAL PROPERTY EXPORT REVIEW BOARD)**

File No.: T-785-00

References: [2001] F.C.J. No. 1469 (QL) (F.C.T.D.)

Date of Decision: September 27, 2001

Before: Rouleau J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 19 , 24 *Access to Information Act (ATIA)*;
s. 3(l) *Privacy Act (PA)*

Other statute(s): S. 241 *Income Tax Act*

Abstract

- S. 44 judicial review
- Discretionary benefit of a financial nature (para. 3(l) *PA*)
- Publicly available information (subs. 19(2) *ATIA*)
- Taxpayer information (s. 241 *Income Tax Act*)

Issues

- (1) Whether the Board erred by refusing to disclose the record under s. 19 of the *ATIA*?
- (2) Whether the Board erred by refusing to disclose the record under s. 24 of the *ATIA* and s. 241 of the *Income Tax Act*?

Facts

This is an application for judicial review pursuant to s. 44 of the *ATIA* following the Canadian Cultural Property Export Review Board's refusal to disclose documents pertaining to its review and approval of a tax credit request by the former City of North York (now Toronto).

Some time prior to April of 1998, Mr. Mel Lastman, former Mayor of the City of North York, approached the municipal authorities of this city indicating his wish to donate a series of documents, papers, speeches, photographs, minutes of meetings, etc. The municipal authorities contacted the Board who, in turn, convened a Review Board to determine if the documents had an archival value and met the criteria to be certified for the City of North York as a donation.

The Review Board determined the fair market value of the documents in question and forwarded a cultural property income tax certificate in the form required by the Minister of National Revenue. This certificate resulted in a tax credit in the amount of \$55,000 to Mr. Lastman.

A reporter submitted a request for all documents pertaining to the Board's review and approval of a tax credit request by or for the former City of North York in regards to the donation of the archives and memorabilia of Mayor Mel Lastman and/or members of his immediate family.

The Board exempted some of the requested documents from disclosure based on ss. 19 and 24 of the *ATIA*. More specifically, the respondent's position is that the records at issue constitute personal information as defined by s. 3 of the *PA*, and therefore in accordance with subs. 19(1) of the *ATIA*, could not be disclosed. The respondent also relied on s. 241 of the *Income Tax Act*, insofar as subs. (10) of that provision restricts the release of taxpayer information.

Finally, the respondent argued that the Court should not interfere with the exercise of its discretion not to disclose.

Decision

The application for judicial review is allowed.

Reasons

Issue 1

Discretionary benefit of a financial nature

In the Court's view, the requested records fall within the meaning of para. 3(l) of the *PA* which provides that for the purposes of s. 19 of the *ATIA*, personal information does not include information relating to any discretionary benefit of a financial nature.

The Court held:

Once a discretionary decision has been made by the Review Board, the individual receives an income tax certificate based on the fair market value of the cultural property donated to a designated institution. [...] The fair market value of the certified cultural property is converted into a tax credit [...] and thus, can be seen as a tax advantage or benefit. [Para. 15.]

Personal information publicly available

Justice Rouleau also found that in any event, the information in question must still be disclosed by virtue of it being publicly available within the meaning of para. 19(2)(b) of the *ATIA*.

References to the fact that the City of North York was granted a "designation" specifically for the purpose of acquiring the Lastman collection are in the public domain by virtue of statements in newspaper articles and the operation of s. 32 of the *Cultural Property Export and Import Act*. The Act requires that an institution that wishes to acquire a donation and submit an application for certification of cultural property for income tax purposes must be designated by the Minister of Canadian Heritage. A "Category B" designation applies to

donations made for a specific purpose. Further, the affiant acknowledged that the institutions designated in Category B and authorized to receive specific donations would be disclosed to the public on request. Finally, Mr. Lastman's career as a public official and businessman is in the public domain, and his personal records and documents which received certification pertain to his public life.

The Court held that the respondent has failed to properly apply subs. 19(2) of the *ATIA* and has therefore failed to discharge its burden under s. 48.

Issue 2

Taxpayer information

Finally, the Court was not persuaded that the information in question constitutes « taxpayer information » within the meaning of s. 241 of the *Income Tax Act*. In the Court's view, taxpayer information refers to information about specific taxpayers obtained through tax returns or collected during tax investigations which would reveal the individual's or the corporation's identity. The Court added that the purpose of this section is to protect the confidentiality of information given to the Minister for the purposes of the *Income Tax Act*, and cannot apply where the information is generally known to be in the public domain and can be compiled with some effort.

Comments

The appeal of Rouleau J.'s order was dismissed: A-633-01, April 25, 2002 ([2002] F.C.J. No. 124 (QL) (F.C.A.)). The Court of Appeal essentially held that the appeal was moot because the contents of the documents in question were held to be in the public domain.

**SIEMENS CANADA LTD. V. MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES CANADA
INDEXED AS: SIEMENS CANADA LTD. V. CANADA
(MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES)**

File No.: T-587-00

References: [2001] F.C.J. No. 1654 (QL) (F.C.T.D.)

Date of Decision: November 5, 2001

Before: McKeown J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 24, 44 *Access to Information Act (ATIA)*

Other statute(s): Ss. 16, 30 *Defence Production Act (DPA)*

Abstract

- S. 44 judicial review
- Application of s. 24 *ATIA* and s. 30 of the *Defence Production Act (DPA)* to documents that are part of the solicitation of a contract as opposed to documents that are part of the actual contract

Issue

Whether the documents should be exempt from disclosure by virtue of ss. 24 of the *ATIA* and 30 of the *DPA*.

Facts

This was a s. 44 application for judicial review of a decision of the Minister of Public Works and Government Services Canada (PWGSC) to release documents submitted by the applicant concerning PWGSC's solicitation for the provision of in-service support on Halifax and Iroquois class ships.

PWGSC distributed a Request for Proposals for the above-mentioned solicitation. The applicant submitted a proposal and was awarded the contract. After the contract was awarded to the applicant, one of the unsuccessful bidders made a request under the *ATIA* for records held by PWGSC in relation to the applicant's participation in the solicitation process.

The Access to Information and Privacy (ATIP) Coordinator informed the applicant that a request for information had been received and that the applicant had the right to make submissions to PWGSC as to why its documents should not be released.

The applicant first responded to the request for information by providing the ATIP Coordinator with a list of the documents that the applicant did and did not object to disclosing and the grounds under s. 20 of the *ATIA* on which it relied.

A few weeks later, the applicant withdrew its previous consent and adopted the position that none of the documents should be disclosed pursuant to subs. 24(1) of the *ATIA* on the ground, among others, that such disclosure would violate s. 30 of the *Defence Production Act (DPA)*. The latter provision is incorporated by reference in Schedule II of the *ATIA*.

PWGSC notified the applicant that it had considered its various arguments and had determined that the documents were only partially exempt by virtue of subs. 19(1), and subparas. 20(1)(b) and (c) of the *ATIA*, and that subs. 24(1) did not apply.

Decision

The application for judicial review was allowed.

Reasons

The respondent argued that s. 30 of the *DPA* does not apply to the requested documents because they are part of the solicitation of the contract, and not part of the actual contract, and that it is only the contract itself that is considered to be the defence contract to which s. 30 may apply.

Pursuant to s. 30 of the *DPA*, “No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business [...]”. The Court held that the information had been obtained “under or by virtue of this Act”, since the Minister derives his or her authority to conduct procurements, and to do all such things as appear to be incidental to such procurements, from s. 16 of the *DPA*. In the Court’s view, it is irrelevant if the information constituted part of the actual contract, or was part of the solicitation. The information in question was all obtained by the Minister acting under the authority given by the *DPA*. Thus, section 1.5 of the Request for Proposals which states in part that “[...] Security clearance must be in place prior to award of Contract” does not take matters relating to security clearance outside s. 30. Therefore, the documents should not be disclosed since the applicant has not provided its consent.

Comments

This decision is under appeal.

**SHELDON BLANK & GATEWAY INDUSTRIES
V. MINISTER OF THE ENVIRONMENT
INDEXED AS: SHELDON BLANK & GATEWAY INDUSTRIES
V. CANADA (MINISTER OF ENVIRONMENT)**

File No.: A-608-00

References: [2001] F.C.J. No. 1844 (QL) (F.C.A.)

Date of Decision: December 3, 2001

Before: Sharlow, Strayer and Linden JJ.A. (F.C.A.)

Section(s) of *ATIA / PA*: Ss. 23, 25 *Access to Information Act (ATIA)*

Abstract

- Treatment of documents incorporated by reference into requested documents
- Extent to which the principles in *R. v. Stinchcombe* are relevant in an *ATIA* request
- Application of s. 25 *ATIA* (severance rule) to records for which an exemption is claimed under s. 23 *ATIA* (solicitor-client privilege)

Issues

- (1) Is the requester entitled to the disclosure of any records “incorporated by reference” into the records that have or should have been disclosed in whole or in part?
- (2) To what extent to are the principles in *R. v. Stinchcombe* relevant to disclosure under the *ATIA*?
- (3) Does the severance rule in s. 25 *ATIA* apply to records for which an exemption is claimed under s. 23 (solicitor-client privilege)?

Facts

This is an appeal from an application for judicial review under s. 41 of the *ATIA* against the refusal of the Minister of the Environment to provide the requester with certain documents relating to the investigation and prosecution of criminal charges (laid under the *Fisheries Act*) relating to effluent allegedly discharged into the Red River from a paper mill in Winnipeg that was owned and operated by Gateway Industries Ltd.

The appellants had sought certain disclosures through criminal courts in Manitoba on the basis of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, but were dissatisfied with the results and made a number of requests under the *ATIA*. They had initially complained to the Information Commissioner who had concluded that the appellants had received all of the documents to which they were entitled. The appellants brought an application for judicial review pursuant to s. 41 of the *ATIA*. The Federal Court (Trial Division)¹ ordered further disclosures but Mr. Blank and Gateway Industries were still not satisfied and appealed.

Decision

With the exception of a few records, the appeal was dismissed. No costs were awarded.

¹ [2000] F.C.J. No. 1147 (QL) (F.C.T.D.).

Reasons

Issue 1: Documents incorporated by reference

The appellants claimed that the attachments referred to in documents in requested files should be within the scope of the requests. The Court simply stated that the Information Commissioner had noted that all records within the scope of the request had been identified and either disclosed or withheld on the basis of an identified exemption. The appellants had adduced no evidence to contradict the conclusion of the Information Commissioner and therefore, their argument was rejected.

Issue 2: The extent to which the *Stinchcombe* principles are relevant

The appellants had claimed that any material that should have been disclosed in the course of criminal proceedings under the *Stinchcombe* principles, and had not been disclosed to date, should now be disclosed in response to the *ATIA* requests.

The Federal Court of Appeal disagreed. The disclosure right recognized in *Stinchcombe* must be administered by courts having jurisdiction in criminal proceedings. In deciding whether appropriate disclosure has been made under the *ATIA*, the Court should consider only the *ATIA* and the jurisprudence guiding its interpretation and application. Laws requiring disclosure in other legal proceedings cannot narrow or broaden the scope of disclosure required under the *ATIA*.

Issue 3: Severance of documents that contain information that is subject to solicitor-client privilege

With the exception of one record, the Court upheld the Minister's claim for solicitor-client privilege. Section 25 of the *ATIA* applies "notwithstanding any other Act" of Parliament. If a document contains a communication that is within the scope of the common law solicitor client privilege and also contains

information that is not within the scope of the privilege, the Minister cannot refuse to disclose the latter.

Moreover, one should not depart from the manner that the Court deals with claims of solicitor-client privilege. The party challenging the privilege is given particulars about the documents rather than the documents themselves. The result is that the documents are reviewed in detail only by the Court to assess whether the exemption applies. No other procedure has been devised than can ensure a reasonable review of the solicitor-client privilege claim without destroying it. To permit opposing counsel to view the documents to determine for himself whether any argument can be made that the privilege does not apply, would risk destroying the privilege, even if an undertaking of confidentiality were given.

Factual statements that were inextricably linked to the legal issue under discussion ought not to have been ordered disclosed by the Trial Judge as they should have been treated as part of the privileged communication. However, as the Minister had not cross-appealed, the order of the Trial Judge was not varied on that account.

There may be instances in which general identifying information² might be subject to solicitor-client privilege. Since the Minister had not provided any evidence to support such a claim, the Court held that the disclosure of “general identifying information” for every letter or memorandum containing a privileged communication could and should have been ordered by the Trial Judge. However, since the most important identifying information could be found in the list of particulars provided to the appellants, further disclosure of identifying information was held not to be necessary in the present case.

² The Court of Appeal characterized “general identifying information” as follows: the description of the document (for example, the “memorandum” heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line and generally innocuous opening and closing words of the communication, and the signature block.

Communications that were between officials of the client department and that contained a description or discussion of legal advice sought or to be sought, or legal advice obtained, were held to be privileged.

Communications between a client department and a third party (in this case a municipal official) might be protected from disclosure under the head of “litigation privilege” if those communications are made in confidence. In the case of most solicitor-client communications, the element of confidentiality is inferred on the basis of the subject of the communication and the surrounding circumstances. However, it is more difficult to support such an inference for a third party communication. In the case at hand, there was nothing in the communication itself nor in the surrounding circumstances that supported such an inference. Neither did the Minister provide any evidence from which the element of confidentiality could be found. The Minister therefore failed to meet the onus of establishing that the s. 23 exemption applied to that record. It was ordered that the record be disclosed.

SMITH V. ATTORNEY GENERAL OF CANADA
INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL)

File No:	27844
References:	[2001] S.C.J. No. 85 (QL) (S.C.C.)
Date of Decision:	December 7, 2001
Before:	McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. (S.C.C.)
Statute(s):	Ss. 6(1), 8 <i>Canadian Charter of Rights and Freedoms</i> ; s. 108(1)(b) <i>Customs Act</i> ; s. 32(b) <i>Unemployment Insurance Act</i>

Abstract

- Disclosure of personal information by Revenue Canada – Customs and Excise to Canada Employment and Immigration Commission
- Datamatch
- Purpose: to identify claimants in receipt of employment insurance benefits during unreported absences from Canada
- Search or seizure under s. 8 *Charter*
- Mobility rights under s. 6(1) *Charter*

Issues

- (1) Does the provision of information by Revenue Canada, Customs and Excise (“Customs”) to the Canada Employment and Immigration Commission (the “Commission”) contravene the appellant’s right to be free from unreasonable search or seizure under s. 8 of the *Charter*?

(2) Does para. 32(b) of the *Unemployment Insurance Act* contravene the appellant's mobility rights under subs. 6(1) of the *Charter*?

Facts

This is an appeal from a judgement of the Federal Court of Appeal (2000), 252 N.R. 172 (C.A.), dismissing an application for judicial review from a decision of an Umpire, CUB-44824, dismissing a claimant's appeal from a decision of the Canada Unemployment Insurance Commission.

The facts, as set out in the Federal Court of Appeal decision, are the following. The appellant was on vacation outside of Canada for two weeks, in early 1995, while in receipt of unemployment insurance benefits. Upon returning to Canada by air, she completed an E-311 Customs Declaration Form. In January 1997, some of the appellant's Customs information was accessed by the Canada Unemployment Insurance Commission under a datamatch program that began operating in September 1996 and with respect to which a formal agreement was signed in April 1997 by the Commission and the Department of National Revenue.

As a result of the matching of information disclosed in the E-311 Form pertaining to the appellant's name, date of birth, postal code, purpose of travel and dates of departure from and return to Canada, the Commission discovered that she had received benefits while out of the country and ordered repayment of those benefits pursuant to para. 32(b) of the *Unemployment Insurance Act* (now para. 37(b) of the *Employment Insurance Act*, S.C. 1996, c. 23).

The appellant argued before the Umpire that the provision of information by Customs to the Commission contravened her right to be free from unreasonable search or seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*. She also argued that by denying her benefits while outside of Canada, para. 32(b) infringed her mobility rights guaranteed by subs. 6(1) of the *Charter*.

The Umpire rejected both grounds of appeal. The Federal Court of Appeal was in substantial agreement with the reasons of the Umpire.

Decision

The appeal was dismissed. The Supreme Court agreed with the conclusions set out in the reasons of Rothstein J., the Umpire, as affirmed by Décaré J.A. for the Federal Court of Appeal.

Reasons

As in *R. v. Plant*, [1993] 3 S.C.R. 281, there was no violation of s. 8 of the *Charter* on the facts of this case. The Supreme Court concluded that the appellant cannot be said to have held a reasonable expectation of privacy in relation to the disclosed portion of the E-311 Customs information which outweighed the Canada Unemployment Insurance Commission's interest in ensuring compliance with self-reporting obligations of the Unemployment Insurance benefit program. Neither was there a breach of the appellant's mobility rights under subs. 6(1) of the *Charter*.

**IN THE MATTER OF THE PRIVACY ACT AND SECTION 108
OF THE CUSTOMS ACT
INDEXED AS: PRIVACY ACT (CAN.) (RE)**

File No.:	27846
References:	[2001] S.C.J. No. 86 (QL) (S.C.C.)
Date of Decision:	December 7, 2001
Before:	McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. (S.C.C.)
Section(s) of ATIA / PA:	S. 8(2)(b) <i>Privacy Act</i> (PA)
Other statute(s):	S. 108(1)(b) <i>Customs Act</i>

Abstract

- Disclosure of information on Customs Traveller Declaration Card to Canada Employment Insurance Commission
- Purpose: to identify claimants in receipt of employment insurance benefits during unreported absences from Canada
- Question of validity of disclosure under s. 8(2)(b) *Privacy Act* and s. 108(1)(b) *Customs Act*
- Datamatch

Issue

Whether the disclosure of personal information by Revenue Canada (Customs) to the Canada Employment Insurance Commission was authorized by the *Customs Act* and the *Privacy Act*?

Facts

This is an appeal from a judgement of the Federal Court of Appeal, [2000] 3 F.C. 82 (T.D.) setting aside an opinion of a Motions Judge ([1999] 2 F.C. 543 (T.D.)).¹

The question put to the Court was the following one:

Is the disclosure of personal information by the Department of National Revenue to the Canada Employment Insurance Commission pursuant to the Ancillary Memorandum of Understanding for data capture and release of customs information on travellers authorized by s. 8 of the *Privacy Act* and s. 108 of the *Customs Act*?

The facts are the following. Recipients of benefits under the *Employment Insurance Act* have an obligation, while receiving benefits, to search for work at all times while claiming benefits and to report any absences from Canada immediately. The Canada Employment Insurance Commission (the “Commission”) and Customs Canada undertook a datamatch program to identify employment insurance claimants who fail to report they were outside Canada while receiving benefits, and to recover any resulting overpayments and, where appropriate, to impose penalties. Customs agreed to disclose to the Commission certain information contained on the Traveller Declaration Card (the E-311 Card) which would be used solely for the purposes of the *Employment Insurance Act*. Customs concluded that the information could be released to the Commission under para. 108(1)(b) of the *Customs Act*, without offending the *Privacy Act*. The disclosure to the Commission was done pursuant to an “Ancillary Memorandum of Understanding for data capture and

¹ The Motions Judge was seized of the question by way of a special case stated pursuant to para. 17(3)(b) of the *Federal Court Act*.

release of customs information” entered into on April 26, 1997 by the Department of National Revenue and the Canada Employment Insurance Commission. This Ancillary Memorandum supplemented an existing Memorandum between the two parties entered into in 1995, replacing a revised Agreement made in 1992 pursuant to an authorization issued by the Minister of National Revenue in 1991 under para. 108(1)(b) of the *Customs Act*. That authorization allows for the disclosure of information obtained for the purpose of the *Customs Act* when, *inter alia*, the information is required for the administration or enforcement of a law of Canada or of a province.

The information made available by Customs consists of the traveller’s name, date of birth, postal code, purpose of travel and dates of departure from and return to Canada.

The Commission conducts the match by comparing both sources of information to produce what is commonly referred to as “hits” – names of persons who appear as out of the country and are receiving employment insurance benefits. The Commission then undertakes a number of further steps to identify claimants who received employment insurance benefits during unreported absences from Canada. Those claimants are then contacted and asked to provide information or an explanation in respect of the evidence that they had received employment insurance benefits during an unreported absence from Canada.

The Court of Appeal found that the disclosure of personal information by the Department of National Revenue to the Canada Employment Insurance Commission pursuant to the Ancillary Memorandum of Understanding for data capture and release of customs information on travellers was authorized by s. 8 of the *Privacy Act* and s. 108 of the *Customs Act*.

Decision

The Supreme Court of Canada dismissed the Privacy Commissioner's appeal substantially for the reasons set out by Décaré J.A. for the Federal Court of Appeal.

(Editor's Note: The Supreme Court did not reiterate those reasons. However, for ease of reference, they are reproduced below.)

The Motions Judge erred by referring to the 1991 Ministerial Authorization and not to the 1997 Ancillary Memorandum. The Ancillary Memorandum constitutes an authorization independent from the 1991 Authorization. The fact that the Ancillary Memorandum was signed by the Deputy Minister of Revenue Canada and not by the Minister does not affect its validity under para. 108(1)(b) of the *Customs Act* which requires an authorization to be given by the Minister. Under para. 24(2)(c) of the *Interpretation Act* a Deputy Minister can act on behalf of his Minister.

The word "information" in subs. 108(1) of the *Customs Act* is to be given its plain, general and encompassing meaning which includes "personal information". As such, an authorization to disclose personal information under para. 108(1)(b) of the *Customs Act* comes within para. 8(2)(b) of the *Privacy Act*.

The Court of Appeal rejected the Privacy Commissioner's argument that Parliament intended for para. 8(2)(b), when read in the context of the entire Act and particularly in light of s. 7, to limit the disclosure of personal information to the purpose for which the information was collected or for a use consistent with that purpose. This provision enables Parliament to confer to any Minister (for example) through a given statute a wide discretion, both as to form and substance, with respect to the disclosure of information his department has collected, such discretion, of course, to be exercised in conformity with the purpose of the *Privacy Act*.

The Court of Appeal was satisfied that the Minister of National Revenue had taken into consideration the objectives of the *Privacy Act* in the 1997 Ancillary Memorandum and the 1995 Memorandum of Understanding, as these documents restricted the Canada Employment Insurance Commission's use of the information and put in place sufficient safeguards to protect the information. The Minister had also satisfied herself that this disclosure was for a permissible use and that no more than the information needed would be disclosed. The Court of Appeal expressed no views as to the validity of the 1991 Ministerial Authorization.

**ALIMENTS PRINCE FOODS INC. V. DEPARTMENT OF AGRICULTURE
AND AGRIFOOD CANADA AND BERNARD DRAINVILLE
INDEXED AS: ALIMENTS PRINCE FOODS INC. V. CANADA
(DEPARTMENT OF AGRICULTURE AND AGRIFOOD)**

File No.: T-1817-98
Reference(s): [2002] F.C.J. No. 73 (QL) (F.C.T.D.)
Date of Decision: January 21, 2002
Before: Richard Morneau, Prothonotary
Section(s) of *ATIA* / *PA*: S. 44 *Access to Information Act (ATIA)*

Abstract

- Judicial review under s. 44 *ATIA*
- Document filed in the public record of the Court and therefore accessible to the public
- No remedy under s. 44
- Application for judicial review dismissed

Issue

Whether an application for judicial review under s. 44 of the *ATIA* is moot, given that the document requested under the *Access to Information Act* has been filed in the public record of the Court.

Facts

This is a motion by the access to information requester for a dismissal of an application for judicial review filed under s. 44 of the *ATIA*.

In support of its application for judicial review under s. 44 of the *ATIA*, the plaintiff, Aliments Prince Foods, filed an affidavit to which several documents were appended including the inspection report to which access was requested. However, the plaintiff did not ask the Court to order that the report remain confidential pursuant to s. 47 of the *ATIA* and Rules 151 and 152 of the *Federal Court Rules, 1998*.

Decision

The motion to dismiss the application for judicial review is granted.

Reasons

The report is part of the public record of the Court because the Court file containing the report is accessible to the public for consultation. Incidentally, that is how the plaintiff obtained a copy of it. The Court cannot, within the meaning of s. 44, remedy or change this situation *a posteriori*. The Court can only issue an order affirming or setting aside the decision of the federal institution to release the document in question. Moreover, there is no special circumstance that would justify setting aside the well-established principle that courts should not entertain academic questions. It is clear that the application for judicial review is moot and must be struck out.

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

File No.: T-582-01

Reference(s): [2002] F.C.J. No. 224 (QL) (F.C.T.D.)

Date of Decision: February 1, 2002

Before: McKeown J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 35, 62, 63, 64, 65 *Access to Information (ATIA)*

Other statute(s): S. 18.1 *Federal Court Act*

Abstract

- Consolidation of judicial review applications
- Transcripts of *in camera* proceedings before the Deputy Information Commissioner
- Power of Federal Court to review the Information Commissioner's exercise of his investigative powers

Issue

Does the Federal Court (FC) have jurisdiction to order the Information Commissioner (IC) to file confidential transcripts of his *in camera* proceedings pursuant to Rule 318 of the *Federal Court Rules, 1998* and, if so, how should the Court exercise its discretion to order production of such transcripts?

Facts

There were 26 applications for judicial review brought by the Attorney General (AG) and named individuals, in which the Information Commissioner was the respondent. There were three applications brought by the Information Commissioner in which the Attorney General was the respondent.

Among those 26 applications, 17 applications related to access requests made to the Department of National Defence for minutes or documents produced from the M5 meetings of 1999. There were six applications relating to access requests made to the Privy Council Office for the Prime Minister's daily agendas. The IC's three applications related to certificates issued under ss. 37 and 38 of the *Canada Evidence Act*.

The AG made motions (1) to consolidate all 29 of the applications for judicial review and (2) to require that transcripts of proceedings before the Deputy IC be filed with the Court on a confidential basis on the judicial review applications.

On the matter of the motion to consolidate all the applications, the Trial Judge concluded that there was insufficient common evidence to justify consolidation of all 29. However, he concluded that there were seven categories or groups of applications and ordered that the seven groups be heard serially (the order to be determined by the judge(s) hearing the applications) and that the applications in each group be consolidated within that group.

With respect to the second motion, the IC submitted that his office was prohibited by the *Access to Information Act* from providing confidential information to the Federal Court in the context of a judicial review proceeding under s. 18.1 of the *Federal Court Act*. The IC also argued that the Federal

Court cannot compel compliance with Rules 317 and 318 of the *Federal Court Rules, 1998* because the Rules are in direct conflict with the *ATIA* and the Act must prevail over the Rules¹.

The IC submitted that ss. 35, 62 and 63 of the *ATIA* preclude the provision of the transcripts of the *in camera* proceedings.

Decision

McKeown J. ordered that the transcripts of the proceedings before the Deputy IC be filed on a confidential basis on the judicial review applications in four of the seven categories: the “confidentiality orders” applications, the “propriety of questions” applications; the “compliance with subpoena” application; and the ss. 37 and 38 *Canada Evidence Act* applications.

Reasons

Justice McKeown concluded that Parliament had not restricted the FC from reviewing transcripts in order to determine if the IC has exceeded his jurisdiction in conducting his investigations. “Parliament certainly intended to avoid making the transcripts public but never intended to give the Information Commissioner the right to conduct investigations without any review” (para. 31). “It is difficult to see how the Court can determine if the allegations by the applicants in this case have any merit without a judge having access to the transcripts “ (para. 31).

The Judge saw no conflict between Rules 317 and 318 and the provisions of the *ATIA*.

¹ Rule 317 provides that a party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application by serving on the tribunal and filing a written request, identifying the material requested. Rule 318 provides, *inter alia*, that, where a party objects to a request under Rule 317, the Court may, after hearing submissions with respect to the objection, order that the material be forwarded to the Registry.

Note that counsel for the applicants did not seek leave to discuss the transcripts with the AG. Only the lawyers would see them and the witnesses who had signed confidentiality orders prepared by the Deputy IC in respect of their own transcripts.

Comments

The Information Commissioner has appealed the order on the production of the transcripts.

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

File No.: T-582-01

Reference(s) [2002] F.C.J. No. 225 (QL) (F.C.T.D.)

Date of Decision: February 1, 2002

Before: McKeown J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 35, 62, 63, 64 *Access to Information Act (ATIA)*

Other statute(s): *S. 5 Department of Justice Act; s. 18.1 Federal Court Act*

Abstract

- Role of Attorney General in protecting the public interest
- Role of Attorney General in conducting litigation on behalf of the Crown
- Right to counsel
- Judicial review of secret investigations

Issues

- (1) Does the Attorney General of Canada (“AGC”) have standing to bring applications for judicial review to determine whether there has been an abuse of the Information Commissioner’s discretionary powers?
- (2) Can the same legal counsel represent the AGC and individual applicants in certain court files?

Facts

The AGC and named individuals brought applications for judicial review. In all of these applications the AGC and the named individuals are represented by the same law firm, Borden Ladner Gervais (“BLG”).

BLG had asked the Information Commissioner (“IC”) to provide them with transcripts and other information gathered during private investigations under the *ATIA*. Their request to the IC was made pursuant to Rule 317 of the *Federal Court Rules, 1998*.

The individual applicants, all clients of BLG, appeared before the IC’s delegate, Alan Leadbeater, pursuant to subpoenas issued by his office and gave evidence before him. The IC agreed that the witnesses could bring legal counsel but subject to three conditions:

- (1) the lawyers would act only for the individual witnesses – not for the AGC;
- (2) there would be confidentiality orders issued against each witness stating that the information concerning the interview could be disclosed only to legal counsel; and
- (3) legal counsel had to give undertakings not to disclose such information to any third parties.

In response to the applications by the AGC and the named individuals, the IC brought two motions:

- (1) to strike the AGC as a party from certain files and to obtain a stay of the AGC proceedings in certain court files (the issue of standing); and
- (2) to remove BLG as solicitors of record for the AGC and for the individual applicants in certain court files.

The IC stressed the requirement to protect the private nature of his investigations pursuant to the Act, in particular ss. 35, 62, 63 and 64.

Counsel for the AGC argued that by bringing these two motions before the Court, the IC has taken the position that the AGC has no right to protect either the public interest in ensuring that the IC's office, an inferior tribunal, is not abusing its discretion or exceeding its jurisdiction, or to protect the interests of the Crown in ensuring that Crown documents are treated in accordance with the law. By bringing these motions the IC is also attempting to prevent the representation of the applicants before the courts by the lawyers who had been acting, with the knowledge and concurrence of the IC's delegate, for all the applicants, both before the IC's delegate and in the courts, for over a year.

Decision

The Information Commissioner's motions to remove certain counsel as solicitors of records and to strike the AGC as a party are dismissed.

Reasons

Issue 1

In determining whether the AGC has a right to bring these applications for judicial review, the Court looked at s. 5 of the *Department of Justice Act*, s. 18.1 of the *Federal Court Act*, and the AGC's special status at common law before the courts as guardian of the public interest.

The Court concluded that the AGC:

- (a) had the right to bring applications to seek remedies to ensure that the public interest is protected;
- (b) had the right to act pursuant to statutory authority to regulate and conduct "all litigation for and against the Crown or any department": para. 5(d) *Department of Justice Act*; and
- (c) to seek to have judicial review of the procedural role of the Information Commissioner.

With regard to the Court's role in supervising the IC's exercise of his discretionary powers, Justice McKeown said:

[...] there is nothing in the *Access to Information Act* which makes the Information Commissioner the sole public body in the country which is not subject to the supervision of the courts. [Para. 28.]

[...] In a democratic society there must be judicial review of secret investigations. [Para. 30.]

While recognizing that the *ATIA* is quasi-constitutional legislation and that the IC has an important role to play in our society, Justice McKeown was of the view that there would have to be specific statutory provisions to preclude the AGC from having the right to protect the public interest and to represent the interests of the Crown in judicial review proceedings.

Issue 2

Justice McKeown concluded that the AGC and the named individuals had the right to choose their counsel, a right that should not be abridged except in very limited circumstances.

The right to choose one's own counsel is a very important principle of law, a "quasi-constitutional principle" (para. 27).

With regard to the IC's concern that the AGC would have access to confidential information from witnesses who were represented by the same law firm as the AGC, it was noted by the Court that counsel for the applicants stated that the AGC was not seeking access to the confidential transcripts but to have them put before the Court for purposes of determining whether there has been an abuse of discretionary powers by the IC. The Court accepted the IC's position that the AGC should not be informed about the IC's investigations but concluded that the confidentiality orders and undertakings by counsel adequately protected the IC in this respect.

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

File No.: T-19-00

Reference(s) : [2002] F.C.J. No. 173 (QL) (F.C.T.D.)

Date of Decision: February 5, 2002

Before: Heneghan J. (F.C.T.D.)

Section(s) of ATIA / PA: Ss. 4(1), 20(1), 25 *Access to Information Act (ATIA)*

Abstract

- Third party information
- Intention to disclose third party's submissions to Health Canada regarding its product
- Application for judicial review pursuant to s. 18.1 Federal Court Act
- Status of requester
- Criteria for application of subs. 20(1)
- Information in public domain

Issues

- (1) Did the requester have status to make a request under the ATIA?
- (2) Should the whole of subs. 20(1) have been applied to the submissions to prevent their disclosure?

Facts

Wyeth-Ayerst produces a natural source of hormone replacement therapy, the active ingredients of which are a family of hormones known as a "conjugated estrogens". In 1997 Health Canada gave notice of proposed changes to the

Regulations under the *Food and Drugs Act* which related to “conjugated estrogens”. The notice gave the public the opportunity to make representations regarding the proposed changes. Wyeth-Ayerst responded by making submissions.

In 1999 Health Canada received an access request that covered the submissions that had been made in response to the 1997 notice. Health Canada notified Wyeth-Ayerst that it intended to disclose some of the latter’s submissions. In response, Wyeth-Ayerst made representations disputing the proposed disclosure. Health Canada did not change its mind, and advised Wyeth-Ayerst of the deadline for seeking judicial review.

Wyeth-Ayerst applied for judicial review under s. 18.1 of the *Federal Court Act*. Wyeth-Ayerst’s position is that, firstly, the requester does not have the status to make the request and, secondly, that its submissions to Health Canada ought to have been protected by the application of all the paragraphs of subs. 20(1). That is, that the documents are intrinsically confidential, commercial information amounting to trade secrets, the disclosure of which would cause harm to the applicant and interfere with future contractual and other negotiations.

Decision

The application was dismissed with costs to the respondent. Wyeth-Ayerst did not establish that it is entitled to the exemption in subs. 20(1).

Reasons

Issue 1

An employee of Health Canada provided affidavit evidence that she had addressed her mind to the eligibility of the requester and concluded that the requester was eligible under the Act to make to request. The applicant did not adduce evidence to show that irrelevant or improper factors entered into the

decision on the eligibility of the requester. The applicant failed to show that the decision did not meet the “sufficiency of the proof” discussed by the Federal Court of Appeal in *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), 45 C.P.R. (3d) 390 (F.C.A.).

Issue 2

The burden of persuasion regarding the non-disclosure of information rests upon the party resisting disclosure (*Maislin Industries Limited. v. Canada (Minister of Industry, Trade & Commerce)*, [1984] 1 F.C. 939 (T.D.)), and the burden of proof required to establish an exemption from disclosure is the balance of probabilities (*Tridel Corp. v. Canada Mortgage and Housing Corp.* (1996), 115 F.T.R. 185 (F.C.T.D.)).

The applicant tried to discharge the burden of proof using affidavit evidence. However, the affidavit evidence provided is insufficient because it is framed in very general language and is based on belief. In relation to paragraphs (c) and (d) of subs. 20(1) the party seeking to prevent disclosure must establish the probability of harmful consequences (*Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services)* (1990), 107 N.R. 89 (F.C.A.)). The affidavits filed by the applicant provide no more than speculation as to probable harm. The affidavits provide only bald assertions unsupported by any evidence. More specifically, in relation to para. 20(1)(d) the applicant must show an obstruction in the actual contractual negotiations (*Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (F.C.T.D.)). The evidence provided by the applicant is insufficient to support this. In addition, much of the information sought to be withheld by the applicant is already in the public domain, either as the result of prior disclosures made by Health Canada’s ATIP office or pursuant to disclosures made in relation to the pharmaceutical industry both in Canada and the United States.

As an alternative remedy, the applicant sought to limit the disclosure of the information using s. 25. The Judge rejected this argument: since the records cannot be withheld from disclosure on the basis of s. 20, there is no grounds for limiting their disclosure under s. 25.

Comments

This decision is under appeal.

**ATTORNEY GENERAL OF CANADA AND JANICE COCHRANE V.
INFORMATION COMMISSIONER OF CANADA
INDEXED AS: CANADA (ATTORNEY GENERAL) V.
CANADA (INFORMATION COMMISSIONER)**

File Nos.: T-2276-00; T-2358-00

Reference(s): [2002] F.C.J. No. 177 (QL) (F.C.T.D.)

Date of Decision: February 6, 2002

Before: Kelen (F.C.T.D.)

Section(s) of *ATIA / PA*: Ss. 9(1)(a), 10(3), 30(1)(c), 30(3), 36(1)(a), 36(2), 37(1), 38, 39 *Access to Information Act (ATIA)*

Abstract

- Powers of the Information Commissioner
- Investigation
- Extension of time limits
- Deemed refusal
- Subpoenas

Issues

- (1) At what point is an investigation of the Information Commissioner complete and did the Information Commissioner exceed the jurisdiction conferred on him by the ATIA by issuing a subpoena duces tecum¹ after having reported his recommendations and findings to the institution involved?
- (2) Can there be a deemed refusal before the expiry of the extended time limit?

¹ Subpoena to produce documents.

Facts

In March 2000, an access requester filed 55 requests for access with the Department of Citizenship and Immigration. These requests involved approximately 270,000 pages of documents. Under para. 7(a) of the *ATIA*, the Department must respond to these requests within 30 days. The Department extended this time limit to three years pursuant to para. 9(1)(a) of the *ATIA*.

The access requester filed complaints with the Information Commissioner pursuant to para. 30(1)(c) alleging that this extension was unreasonable.

The Commissioner conducted a first investigation and on September 20, 2000, sent a letter to Janice Cochrane, Deputy Minister, Department of Citizenship and Immigration, stating the findings of the investigation (namely that the extension was unreasonable) and recommendations (namely that the Department shall respond to the access requests within the time limit determined by the Commissioner). Also, the Commissioner advised the Deputy Minister that, if she did not comply with his recommendation, he would compel the Minister or a delegate of the Department to produce the documents, along with a line-by-line justification for the refusal to disclose.

The Department refused to follow up on this recommendation on the grounds that it was impossible for the Department to respond to the access requests due to insufficient resources. Shortly thereafter, the Commissioner served the first *subpoena duces tecum* on the Deputy Minister, ordering her to appear before him with the 270,000 documents.

On December 7, 2000, the Attorney General of Canada filed the first application for judicial review pursuant to s. 18.1 of the *Federal Court Act* to set aside the subpoena. On the same day, the Information Commissioner notified the Deputy Minister that he planned to exercise the power in subs. 30(3) of the *ATIA* and initiate a complaint based on the Department's "deemed refusal" to disclose the records. Following this notice, the Commissioner issued a second *subpoena duces tecum* to the Deputy Minister, identical to the first.

The second application for judicial review was filed regarding the second subpoena. In the meantime, the Court ordered a temporary stay of the two subpoenas.

Decision

The two *subpoenas duces tecum* are set aside.

Reasons

Issue 1

First, the Court found that the standard of review for decisions of the Commissioner to proceed with an investigation is “correctness”.

The Commissioner’s investigation is complete when the Commissioner reports the findings of the investigation and recommendations to the institution concerned. The first subpoena is therefore invalid since the Commissioner issued it after completing the investigation with respect to the complaint that the extension was unreasonable. Since the investigation was completed, the Commissioner no longer had the jurisdiction to subpoena witnesses “in relation to the carrying out of the investigation of any complaint” within the meaning of subs. 36(1).

Issue 2

Under the *ATIA*, there is a deemed refusal once the time limit set out in the Act, including the time limit validly extended by the institution, has expired. Under the circumstances, there could not have been a “deemed refusal” because the extended time limit had not expired. Therefore, the Commissioner exceeded his jurisdiction by initiating a complaint based on the Department’s “deemed refusal” and by issuing the second subpoena. Since the second investigation is not valid, neither is the second subpoena.

The Court found that it was not proper for the respondent to initiate a new complaint and launch a new investigation into the same matter on which the Commissioner had just concluded a first investigation. Also, it is not proper for the respondent to use his subpoena powers to compel an institution to comply with a recommendation of the Commissioner which an institution has chosen not to follow up on.

The Commissioner's powers, when dealing with complaints relating to the unreasonableness of an extension, are limited to conducting an investigation, reporting the findings and making recommendations to the institution involved and reporting the problem to Parliament.

Comments

This decision is under appeal.

**CISTEL TECHNOLOGY INC. V. CORRECTIONAL SERVICE CANADA
INDEXED AS: CISTEL TECHNOLOGY INC. V.
CANADA (CORRECTIONAL SERVICE)**

File No.:	T-2360-00
Reference(s)	[2002] F.C.J. No. 328 (QL) (F.C.T.D.)
Date of Decision:	March 5, 2002
Before:	McKeown J. (F.C.T.D.)
Section(s) of <i>ATIA / PA</i>	Ss. 20(1)(b), 44 <i>Access to Information Act (ATIA)</i>

Abstract

- Third party judicial review
- Scope of request for access
- Confidentiality test not met

Issues

- (1) Were certain records produced by CSC part of the scope of the request for access?
- (2) Did the information to be disclosed fall under para. 20(1)(b) of the *ATIA*?

Facts

The applicant, Cistel Technology Inc. (Cistel) provides information technology personnel to perform work pursuant to various contracts and standing offers it secures. It successfully bid for three standing offers with the Correctional Service of Canada (CSC). A request for access was made for “copies of all invoices for services Technology Inc. to Correctional rendered by Cistel Services Canada from 1997 to date”. Cistel’s invoices indicate the name and

the position of the personnel performing the work, their per diem rates, the number of days they have worked on the project that month and the total charges invoiced for that period. CSC indicated to Cistel its intention to disclose all invoices with the exception of the individuals' per diem rates, the number of days they worked on the project and the total charges broken down by individual. Cistel thereupon applied for judicial review, seeking an order that only its identity and the total contract price be released under the *ATIA*.

The main question is whether the invoices, without the information that CSC agreed to remove, are confidential. The remaining information consisted of the names of Cistel's employees who had worked on the project, their position and the total dollar amount for a one-month period. A secondary question is whether the payment vouchers and the task request/authorization forms of CSC which were produced by CSC were part of the request.

Decision

The application for judicial review was dismissed. The respondent, CSC, was directed not to disclose the payment vouchers and the task request/authorization forms.

Reasons

Issue 1

On the issue of the scope of the request, the Court was of the view that CSC's payment vouchers and its task request/authorization forms were not invoices and, therefore, should not be disclosed as part of the access request.

Issue 2

The applicant failed to establish that the information left on the invoices was confidential information in an objective sense and that it had treated it consistently in a confidential manner: *Air Atonabee Limited v. Canada (Minister of Transport)* (1987), 27 F.T.R. 194 (F.C.T.D.).

There is nothing on the invoices to indicate that they are confidential. The names of the support staff that work for Cistel are easily ascertainable by companies in that business and, therefore, cannot be said to be confidential from any objective standpoint. Furthermore, a total dollar amount for a one-month period would not be of great assistance to any competitor.

The affidavit of Cistel's Chief Executive Officer states that the information was treated in a confidential manner but fails to indicate how this was done. A mere assertion, without direct cogent evidence on how the information was treated in a confidential manner, does not suffice to establish the application of para. 20(1)(b).

Comments

This decision is under appeal.

**ST. JOSEPH CORPORATION V. PUBLIC WORKS AND
GOVERNMENT SERVICES CANADA
INDEXED AS: ST. JOSEPH CORP. V. CANADA
(PUBLIC WORKS AND GOVERNMENT SERVICES)**

File No.: T-2785-97

Reference(s): [2002] F.C.J. No. 361 (QL) (F.C.T.D.)

Date of Decision: March 12, 2002

Before: Heneghan J. (F.C.T.D.)

Section(s) of *ATIA* / *PA*: Ss. 20(1), 20(2), 23, 44 *Access to Information Act*
(*ATIA*)

Abstract

- Standard of review under s. 44 *ATIA*
- Criteria for application of subs. 20(1) *ATIA*
- Interests of other third parties
- Solicitor-client privilege and common interest

Issues

- (1) What is the standard of review under s. 44 *ATIA*?
- (2) Has the third party satisfied its evidentiary burden under subs. 20(1) *ATIA*?
- (3) Does subs. 20(2) *ATIA* apply?
- (4) Does the third party have standing to invoke the interests of other third parties?
- (5) Does solicitor-client privilege apply to legal opinions exchanged between the third party and the respondent?

Facts

The applicant, St. Joseph Corp., carries on a printing business through its subsidiary, St. Joseph Printing Ltd. In the spring and fall of 1996, the applicant engaged into negotiations about the sale of certain assets of Canada Communications Group (CCG), a printing, warehousing and distribution operation of the federal government which the government intended to privatize.

The applicant entered into a confidentiality agreement with the government which provided that “any analyses, compilations, forecasts, studies or other documents prepared relative to the investigation of CCG by the Applicant for the purposes of the proposal acquisition would be held in confidence ‘in perpetuity’.” In addition the agreement provided that neither party could disclose any of the matters referred to, or the transactions contemplated by the sale and purchase of CCG.

An Agreement of Purchase and Sale was ultimately executed. The Agreement included Appendices “A” through “V” and certain other documents which amended and supplemented it, referred to as the “Closing Documents”. The Agreement and the Closing Documents were the subject matter of a request for access made under the *ATIA* (the “requested records”). The respondent Department notified the third party of its decision to disclose a portion of the requested records. The third party sought an order, under s. 18.1 of the *Federal Court Act*, that the requested records not be disclosed on the basis of subss. 20(1) and 20(2) *ATIA*.

Decision

The application for judicial review was allowed in part. The legal opinions were exempt from disclosure.

Reasons

Issue 1: Standard of review and onus of proof

The standard of review for an application under s. 44 *ATIA* is correctness. Given the use of the word “shall” in s. 20, no deference is to be accorded to decisions of heads of government institutions who decide to disclose records. The Court’s role is to consider these decisions on a *de novo* basis.

The onus of proof lies with the party resisting disclosure. Since the *ATIA* is meant to provide the public with a right of access to information subject to specific and limited exemptions, the Act places a heavy burden on the party resisting disclosure.

Issue 2: The subs. 20(1) exemption

Paragraph 20(1)(a)

The applicant’s affidavit did not establish how the requested records met the legal test of a “trade secret” as defined in *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (F.C.T.D.). The affidavit was drafted in general terms only and was more in the nature of speculation than in the nature of a statement of facts.

Paragraph 20(1)(b)

Confidentiality agreements may be taken into account by the Court in assessing the objective confidentiality of the information. However, confidentiality agreements remain subordinate to the *ATIA*. While the confidentiality agreement and clauses in the present case may be binding as between the parties, public policy does not permit such a clause to allow parties to contract out of the *ATIA*.

The Court held that the applicant had not met the evidentiary burden required under para. 20(1)(b).

Paragraphs 20(1)(c) and (d)

The very general statements made in the affidavit did not support the contention that disclosure of the records would result in a reasonable expectation of probable harm. The applicant did not show an obstruction in the actual contractual negotiations required by para. 20(1)(d).

The evidence also fell short of establishing that the disclosure of the leases and subleases would result in a reasonable expectation of probable harm.

Issue 3: Application of subs. 20(2)

The phrase “for a fee” is a qualifying phrase. In the absence of evidence that a fee was paid, the Court was unable to find that subs. 20(2) applied.

Issue 4: Interests of third parties other than the applicant

The third party’s request that the names of other third parties as they appeared in various documents be deleted on the ground that these third parties were entitled to third party notice, was dismissed. It is the applicant’s interests which are under review, not those of other third parties: *Tridel Corp. v. Canada Mortgage and Housing Corp.* (1996), 115 F.T.R.185 (F.C.T.D.).

Issue 5: Solicitors’ opinions

The requested records contained legal opinions prepared by the solicitors for both parties that the sale was proper and in accordance with applicable legislation. The respondent exempted portions of the advice received from its solicitors, but none of the advice received from the solicitors of the applicant.

The Court found that there was a legitimate interest in protecting legal advice provided to parties to a commercial transaction such as the one involved here. The parties had a joint interest in ensuring completion of the transaction. There was a common interest privilege in the legal opinions exchanged in this case, particularly in light of the joint submissions from counsel from both parties. Section 23 *ATIA* therefore applied to the advice received from the third party's counsel.

Comments

This decision is under appeal.

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Merchant Seamen**Compensation Board**

see Human Resources
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**Military Police Complaints
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Nanaimo Port Authority

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National Battlefields Commission

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see Treasury Board of Canada
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Petroleum Compensation Board

see Natural Resources Canada

**Petroleum Monitoring
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Statute Revision Commission

see Department of Justice Canada

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**Veterans Review Appeal
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see Veterans Affairs Canada

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PROJECT TO REVIEW INFO SOURCE PUBLICATIONS

The Information and Security Policy Division of Treasury Board Secretariat (TBS) recently launched an initiative to review and revise its current suite of Info Source publications. Info Source is a key reference tool to assist members of the public in exercising their right of access to information (including personal information held about them) in records under the control of a government institution. Info Source also supports the government's policy to promote open and accessible information regarding its activities.

The current format utilized for Info Source was established in 1990 and it has not undergone any extensive modifications since that time. To ensure that Info Source is a sound, user-friendly suite of publications that users can depend upon, the Info Source Review Project was initiated. The purpose of this project is to review the publications and develop recommendations on how to improve the format and content of all Info Source publications to facilitate the requirements of the general public, the ATIP community, librarians and all other interested users. The publications under review are:

Sources of Federal Government Information

This publication describes the organization and information holdings of all federal government institutions subject to the *Access to Information Act* and/or the *Privacy Act*.

Sources of Federal Employee Information

This publication lists personal information banks on federal employees for all government institutions subject to the *Privacy Act*.

Directory of Federal Government Enquiry Points

This publication is intended for use by the public and by public service employees. It contains one section entitled "Federal Government Enquiry Points" that lists contact information for federal departments and agencies.

Access to Information Act and Privacy Act Bulletin

This annual *Info Source* bulletin contains summaries of federal court cases and statistics of requests made under the *Access to Information Act* and the *Privacy Act*.

The Information and Security Policy Division (ISPD) of TBS invites you to provide comments and/or opinions on the use and effectiveness of Info Source either by mail to:

Laura Simmermon
Information and Security Policy Division
Government Operations Sector
Treasury Board of Canada Secretariat
L'Esplanade Laurier
140 O'Connor Street, 8th Floor, East Tower
Ottawa ON K1A 0R5

Or by completing a short Questionnaire that is accessible from the Info Source web site at: <http://infosource.gc.ca/index-e.html>

**INFORMATION
ON THE GOVERNMENT
OF CANADA
AND THE CANADA SITE**

Information on the Government of Canada

Information on the Government of Canada is the federal government's bilingual, toll-free general information and referral service.

You may contact Information on the Government of Canada at the following telephone numbers:

Toll-free 1 800 O-Canada (1 800 622-6232)

TTY 1 800 465-7735

Canada 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 Internet address for this site is www.canada.gc.ca.