



Government
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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
2000–2001
ACCESS TO
INFORMATION**

Access to Information – 2000–2001
Disposition of Requests

Requests received		20,789
Requests completed	100.0%	20,834
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	37.5%	7,804
Some disclosed	35.6%	7,407
No records disclosed – excluded	0.3%	68
No records disclosed – exempted	3.0%	616
Transferred	1.3%	279
Treated informally	1.9%	400
Could not be processed	20.4%	4,260
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Access to Information – 2000–2001
Source of Requests

Requests received	100.0%	20,789
Business	40.9%	8,503
Public	31.5%	6,561
Organizations	16.0%	3,325
Media	10.8%	2,244
Academics	0.8%	156

Access to Information – 2000–2001
Ten Institutions Receiving Most Requests

Requests received by all institutions	100.0%	20,789
Citizenship and Immigration	27.6%	5,746
National Archives	10.3%	2,140
Health	6.5%	1,345
Human Resources Development	5.4%	1,114
National Defence	5.2%	1,088
Canada Customs and Revenue Agency	4.2%	880
Public Works and Government Services	3.5%	733
Royal Canadian Mounted Police	2.8%	584
Fisheries and Oceans	2.7%	548
Industry	2.4%	505
Other Departments	29.4%	6,106

Access to Information – 2000–2001
Time Required to Complete Requests

Requests completed	100.0%	20,834
0 – 30 days	59.3%	12,356
31 – 60 days	17.1%	3,572
61 + days	23.6%	4,906

Access to Information – 2000–2001
Exemptions

Total exemptions	100.0%	19,424
Section 19 – Personal information	28.0%	5,433
Section 20 – Third party information	23.9%	4,634
Section 21 – Operations of government	18.6%	3,608
Section 16 – Law enforcement and investigations	8.1%	1,564
Section 15 – International affairs and defence	5.4%	1,059
Section 13 – Information obtained in confidence	5.0%	967
Section 23 – Solicitor-client privilege	4.3%	840
Section 14 – Federal-provincial affairs	2.4%	463
Section 18 – Economic interests of Canada	2.2%	428

Section 24 – Statutory prohibitions	1.3%	259
Section 26 – Information to be published	0.3%	68
Section 17 – Safety of individuals	0.3%	55
Section 22 – Testing procedures	0.2%	46

Access to Information – 2000–2001

Costs and Fees for Operations

Requests completed	20,834
Cost of operations	\$21,564,892
Cost per request completed	\$1,035
Fees collected	\$259,710
Fees collected per request completed	\$12.47
Fees waived	\$155,271
Fees waived per request completed	\$7.45

**STATISTICAL
TABLES
2000–2001
PRIVACY**

Privacy – 2000–2001
Disposition of Requests

Requests received		104,133*
Requests completed	100.0%	103,169*
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	22.6%	23,329
Some disclosed	52.1%	53,745
No records disclosed – excluded	0.0%	19
No records disclosed – exempted	0.4%	388
Could not be processed	24.9%	25,688
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

The significant increase in the number of privacy requests received and completed in 2000–2001 is due to the high volume of requests received and completed in the Department of Human Resources Development Canada.

Privacy – 2000–2001
Five Institutions Receiving Most Requests

Requests received by all institutions	100.0%	104,133
Human Resources Development	72.6%	75,669
National Defence	5.1%	5,279
Correctional Service	4.6%	4,786
Citizenship and Immigration	4.3%	4,447
National Archives	3.9%	4,097
Other Departments	9.5%	9,855

Privacy – 2000–2001
Time Required to Complete Requests

Requests completed	100.0%	103,169
0 – 30 days	25.1%	25,923
31 – 60 days	6.7%	6,907
61 + days	68.2%	70,339

**Privacy – 2000–2001
Exemptions**

Total exemptions	100.0%	73,200
Section 26 – Information about another individual	93.1%	68,189
Section 22 – Law enforcement and investigation	3.5%	2,553
Section 19 – Personal information obtained in confidence	1.6%	1,160
Section 27 – Solicitor-client privilege	0.6%	439
Section 24 – Individuals sentenced for an offence	0.5%	362
Section 21 – International Affairs and defence	0.4%	272
Section 23 – Security clearances	0.1%	95
Section 18 – Exempt banks	0.1%	59
Section 25 – Safety of individuals	0.1%	42
Section 28 – Medical records	0.0%	25
Section 20 – Federal-provincial affairs	0.0%	4

Privacy – 2000–2001
Costs and Fees for Operations

Requests completed	103,169
Cost of operations	\$18,804,004
Cost per request completed	\$182

**STATISTICAL
TABLES
1983–2001
ACCESS TO
INFORMATION**

Access to Information – 1983–2001
Disposition of Requests

Requests received		185,897
Requests completed	100.0%	180,895
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	35.1%	63,423
Some disclosed	35.0%	63,305
No records disclosed – excluded	0.6%	1,054
No records disclosed – exempted	3.2%	5,796
Transferred	1.9%	3,516
Treated informally	4.9%	8,818
Could not be processed	19.3%	34,983
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Access to Information – 1983–2001
Time Required to Complete Requests

Requests completed	100.0%	180,895
0 – 30 days	57.7%	104,423
31 – 60 days	17.8%	32,196
61 + days	24.5%	44,276

Access to Information – 1983–2001
Costs and Fees for Operations

Requests completed	180,895
Cost of operations	\$163,922,261
Cost per request completed	\$906
Fees collected	\$2,569,783
Fees collected per request completed	\$14.21
Fees waived	\$1,051,976
Fees waived per request completed	\$5.82

**STATISTICAL
TABLES
1983–2001
PRIVACY**

Privacy – 1983–2001
Disposition of Requests

Requests received		804,216
Requests completed	100.0%	798,112
(Includes requests brought forward from previous year)		
Disposition of requests completed:		
All disclosed	55.7%	444,767
Some disclosed	28.5%	227,788
No records disclosed – excluded	0.0%	139
No records disclosed – exempted	0.8%	6,417
Could not be processed	15.0%	119,001
(Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)		

Privacy – 1983–2001
Time Required to Complete Requests

Requests completed	100.0%	798,112
0 – 30 days	55.4%	442,390
31– 60 days	19.4%	154,794
61 + days	25.2%	200,928

Privacy – 1983–2001
Costs and Fees for Operations

Requests completed	798,112
Cost of operations	\$135,878,010
Cost per request completed	\$170

FEDERAL COURT CASES

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

**OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES V. ROBERT LAVIGNE
INDEXED AS: LAVIGNE V. CANADA (COMMISSIONER OF OFFICIAL LANGUAGES)**

File No.: A-678-98

References: [2000] F.C.J. No. 1412 (QL) (F.C.A.)

Date of Decision: September 6, 2000

Before: Linden, McDonald and Sharlow JJ.A.

Section(s) of ATIA/PA: S. 22(1)(b) *Privacy Act (PA)*

Abstract

- Investigation by Commissioner of Official Languages
- Para. 22(1)(b) *PA* not applicable
- “Conduct of lawful investigations”: chilling effect on possible future investigations not a factor
- Possible reluctance of witnesses to cooperate with investigators unless assurances of confidentiality given not establishing reasonable expectation of injury to enforcement of *Official Languages Act*

Issue

Did the Motions Judge err in concluding that Mr. Lavigne was entitled to all of his personal information requested under the *Privacy Act*?

Facts

This is an appeal by the Office of the Commissioner of Official Languages (COL) against a decision of the Trial Division ((1998), 17 F.T.R. 15) ordering the COL to disclose to the respondent Lavigne all of his personal information. The COL had refused to disclose notes of interviews taken in the course of an investigation of a complaint made by Mr. Lavigne under the *Official Languages*

Act. The appellant relied on para. 22(1)(b) *PA* (reasonable expectation of injury to the enforcement of a law or the conduct of lawful investigations) to refuse disclosure. The Motions Judge ruled that the COL could not refuse to disclose the information requested on the ground that the disclosure would be injurious to the conduct of the investigation since the investigation was over.

Decision

The appeal was dismissed.

Reasons

It has been clearly stated in the caselaw that para. 22(1)(b) cannot justify a refusal to disclose information on the basis that disclosure would have a chilling effect on possible future investigations. The FCA was not persuaded that the interpretation adopted in the caselaw was wrong nor did it accept the COL's argument that a different interpretation was justified in this case by the statutory mandate of the COL and the statutory duty of confidentiality imposed on the COL.

In addition, the evidence did not support a conclusion that disclosure could reasonably be expected to be injurious to the enforcement of any law in Canada. The evidence establishes, at most, the possibility that witnesses may be reluctant to cooperate with the COL's investigators unless they have an assurance of secrecy. That does not establish that disclosure could reasonably be expected to be injurious to the enforcement of the *Official Languages Act*.

Comments

Applications for leave to appeal and for leave to cross-appeal were granted by the Supreme Court of Canada.

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

File Nos.:	T-1474-99; T-1477-99
References:	[2000] F.C.J. No. 1620 (QL) (F.C.T.D.)
Date of Decision:	October 5, 2000
Before:	Muldoon J. (F.C.T.D.)
Section(s) of <i>ATIA/PA</i> :	Ss. 11(2), (6), 41, 49 and 50 <i>Access to Information Act (ATIA)</i> ; s. 7 <i>Access to Information Regulations</i>

Abstract

- Disclosure of records following *ATIA* request to Environment Canada
- Allegation that all records not released
- Jurisdiction of Court under s. 41 *ATIA*
- Actual or constructive (deemed) refusal to disclose
- Evidence required to substantiate claim of existence of records
- Reasonableness of search fee for deleted e-mails

Issues

- (1) Does the Court have jurisdiction to grant a remedy in the present circumstances?
- (2) Is it reasonable of the institution to require the payment of a search fee of \$5,700 for deleted e-mails?
- (3) Can the applicant introduce a supplementary affidavit as evidence?

Facts

The applicant requested documents from Environment Canada (EC) under the *ATIA* in relation to himself and his company, Gateway Industries.

Two separate access requests were presented to Environment Canada, one on November 20, 1998 and the second one on January 5, 1999.

The information sought in the first request included a search for deleted e-mails. Environment Canada acknowledged receipt of this request, but subsequently informed the applicant that the search would require an estimated amount of 575 hours of work and that it would be subject to a \$10/hour fee, which totalled \$5,700. EC required a deposit of 50%. The applicant subsequently asked EC to delete the e-mail search from his original request, stating that if he thought it necessary after the paper search, he would pay the fee at that time. The applicant never reasserted the e-mail search and never asked EC to waive the fee under the *ATIA*.

The applicant received the requested information on January 14, 1999, but some of the information in one of the documents was withheld pursuant to subs. 19(1) *ATIA*. The applicant filed a complaint with the Information Commissioner (IC), stating that he “was positive that there were many more records with Environment Canada”. The Commissioner did not support his complaint.

The second access request pertained to any information about six named employees of EC, any communications between them, from them and to them in relation to the applicant and/or his company. EC subsequently notified the applicant that despite a thorough search, no records were located in relation to that request. The applicant filed a second complaint with the IC, again stating he was positive EC had other documents. The IC informed the applicant on July 20, 1999 that his complaint was found not to be substantiated.

EC subsequently discovered in the document search related to the second complaint investigation that all documents sought, except one, had already been released to the applicant as a result of a different access request. The only document not previously released was provided to him on September 30, 1999.

The applicant now seeks a judicial review of the refusal by the head of EC to disclose the records sought in relation to both access requests. More specifically, the applicant seeks the release of records which he asserts exist but have not been provided to him and the release of any deleted e-mails to be provided at no charge.

Decision

The application for judicial review was dismissed.

Reasons

Issue 1

The Court was of the opinion that in both applications, there had been no actual or constructive (deemed) denial of access to information. The Court stated that a judicial review of the decision of the head of an institution “is available only where there is an actual or constructive refusal of access continuing at the time of the hearing in Court”. Without such a refusal, the Court does not have jurisdiction to grant the only available remedy, which is an order to disclose. The legislation does not provide for an order for a “more thorough search and disclosure”.

The Court cited *X v. Canada (Minister of National Defence)* (1991), 41 F.T.R. 73 (F.C.T.D.) in which Justice Strayer stated that the “Refusal of access is a condition precedent to an application under those sections...”. Strayer J. went on to state:

...unless there is a genuine and continuing refusal to disclose and thus an occasion for making an order for disclosure or its equivalent, no remedy can be granted by this Court...

The Court concluded that the applicant was unable to provide substantial evidence to support his allegations that EC was withholding information, despite that fact that he was given the opportunity to do so. Where an applicant claims that documents are being withheld, there must exist some evidence of the fact beyond mere suspicion (*Creighton v. Canada (Superintendent of Financial Institutions)*, [1990] F.C.J. No. 353 (QL) (F.C.T.D.)). Muldoon J. found that the allegations remained unfounded suspicions and nothing more.

The application for judicial review was therefore dismissed for lack of jurisdiction as the legislation does not provide for any remedy in the present circumstances.

Issue 2

With regards to the fee required to conduct the search, the Court acknowledged that e-mails are regularly deleted by systems users and are almost impossible to reproduce for the purpose of an access request. In the present case, the search would require an extension of time to be requested for the fulfilment of the entire request and would occupy an employee with a single project for a period of almost four months, thus creating a strain on the Information Technology department of EC. The Court was of the opinion that in such circumstances, “it is quite reasonable to request that the additional fee be provided”.

The applicant argues that EC should have waived the fee. He asserts that this “exorbitant” fee was imposed on him to deter the search. The Court addressed this issue by stating that:

while the 50% deposit may be excessive, the waiver of the fee is just as unrealistic. In forcing the e-mail search, the applicant is virtually “commandeering” an EC employee for his own purposes for a significant period of time.

The Court then went on to note that the head of the institution has the discretion to waive the fee and that the required deposit was lawful.

Issue 3

The applicant wanted to introduce as evidence 158 pages of documents produced to him by EC as evidence in support of the alleged missing documents.

The Court applied the test outlined in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2000] 2 F.C. 400 (T.D.), to determine if this material could be introduced as evidence. Justice Muldoon concluded that while the material was not particularly illustrative, the supplementary affidavit ought to be admitted as it was material to an issue to be decided and thus served the interests of justice. Furthermore, the respondent could not be prejudiced by it since the respondent was aware of the contents of the material. In any event, the issue of the supplementary affidavit was moot since the Court lacked jurisdiction to hear the applications for judicial review.

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

File Nos.: T-1640-00; T-1641-00

References: [2000] F.C.J. No. 1648 (QL) (F.C.T.D.)

Date of Decision: October 19, 2000

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

Section(s) of ATIA/PA: Ss. 36(1)(a), 63(1) *Access to Information Act (ATIA)*

Abstract

- Motions for interim relief prohibiting enforcement of subpoenas issued by Information Commissioner
- Records within Prime Minister's and Minister of National Defence's offices
- Test for granting interim relief met
- Whether records "under control" of Privy Council Office and Department of National Defence is a serious issue to be tried

Issues

- (1) Have the applicants met the tripartite test for the granting of the interim relief (serious issue to be tried, irreparable harm and balance of convenience favouring the granting of the interim relief)?
- (2) Is the Information Commissioner's motion to strike out the applications for judicial review warranted?

Facts

The Privy Council Office (PCO): In June 1998, PCO received six access requests – one of which sought the release of the Prime Minister’s daily agenda book for the years from 1994 to date. The Prime Minister’s daily agenda was kept and exclusively archived in electronic format in the PM’s office. Up until approximately twelve months ago, it was the Prime Minister’s Executive Assistant’s practice to fax a copy of the next day’s agenda to the Clerk of the Privy Council. That copy was provided for the sole information of the Clerk of the Privy Council and his or her executive assistant. The agenda was discarded after it was used that day. As such, the only archived copy of the PM’s agenda was in the PM’s office. In addition, a copy of the agenda showing only the locations to be visited by the PM was also made available to the RCMP. PCO neither confirmed nor denied the existence of any records relating to the subject matter of the request, but stated that, should they exist, they would be exempt in their entirety as being personal information, pursuant to subs. 19(1) of the *ATIA*. The requester filed a complaint with the Information Commissioner’s office. The Deputy Commissioner, in a letter to the PM’s Chief of Staff, indicated his concern that the PM was of the view that his office was not subject to the *ATIA*. Following this letter, a subpoena was issued to Bruce Hartley, an exempt staff member in the PM’s office.

The Department of National Defence (DND): In November 1999, DND received an access request for minutes or documents produced from the M5 management meetings for 1999. “M5” was the term used to describe the informational meetings among the Minister of National Defence, his senior exempt staff, the Deputy Minister and the Chief of Defence Staff. In February 2000, the acting Director of Access to Information and Privacy at DND advised the requester that a search had failed to uncover any documents fitting the description in his request. The requester filed a complaint with the Information Commissioner’s office.

Upon a further search for documents under the control of DND, some materials were provided to the Commissioner's office but the Assistant Deputy Minister refused to disclose or remit the notebooks of the three applicants stating that "these notes are not filed or circulated, nor are they under the control of the Department". Subpoenas were issued to three of the DND Minister's exempt staff to appear before him and produce all records generated, used or obtained during the course of their duties, including notebooks containing information with respect to any and all DND M5 management meetings. The notebooks were not part of the records management system of the Minister's office, nor had they been included in the records management system of DND. They were not shared with anyone in the Minister's office.

The Attorney General of Canada and the individuals who received subpoenas brought applications for judicial review to the Federal Court seeking a declaration that records held exclusively in the office of the Minister of DND and in the PM's office are not under the control of DND or PCO respectively.

This case turns on the motions for interim relief filed by the Attorney General of Canada and the individuals who have been served subpoenas prohibiting the Information Commissioner from requiring them to give evidence or produce documents from both the Prime Minister's Office and the Minister of National Defence's Office until such time as the Federal Court entertains the matter in judicial review. The Court also dealt with the Information Commissioner's motion to strike out the applications for judicial review on the basis that they were premature.

Decision

The applicants' motions for interim relief were granted. The Information Commissioner's motion to strike out the applications for judicial review was dismissed. The applications for judicial review were to be expedited and specially managed.

Reasons

Issue 1

The Court found that there was a serious issue to be tried. It was neither frivolous nor vexatious for the applicants to allege that ministers' offices are not "government institutions" within the meaning of the *ATIA*. The Court recognized that there are arguments to be made that government departments have separate functions from ministers' offices and that the records sought were not under the control of the PCO nor DND respectively. In addition, upon examining the individual applicants' affidavits to the effect that they had no knowledge of any such documents within PCO or DND, the Court found that it was arguable that the applicants had no relevant evidence to give in answer to the subpoenas issued by the Commissioner.

The Court recognized that subs. 63(1) of the *ATIA* is very broad. The Court notes that "while there are several other sections which require the Commissioner to keep documents confidential, it is arguable that he may have the power to release certain confidential information in order to further his investigation." The Court added that notwithstanding the confidentiality provision placed on the Information Commissioner's office, there is irreparable harm to the applicants if the material in question is released in whole or in part prior to the determination of the question on judicial review.

As such, the Court held that the balance of convenience favoured the applicants, as the nature of the harm that would inure to them should the interim relief not be granted far outweighs any inconvenience that the respondents may suffer from the delay of the continuation of the Commissioner's investigation.

Issue 2

The Information Commissioner's motion to strike out the applications for judicial review was dismissed. McKeown J. noted that "the Federal Court of Appeal has stated that it is generally improper to file motions to strike judicial review proceedings. The proper manner to test the merit of a judicial review application is to argue and appear at the hearing of the application itself".

The Court considered the Information Commissioner's argument that the applications for judicial review were premature. On that point, the Court held that the issue of prematurity would be best dealt with by the judge hearing the application for judicial review, rather than on a motion to strike.

The Court, applying *Federal Court Rule 303(3)*, granted the applicants leave to have the Commissioner named as the respondent.

Comments

The Federal Court of Appeal set aside the Trial Division's order to prohibit the Information Commissioner from requiring that the concerned individuals give evidence and to produce documents pursuant to the subpoenas. The applications for judicial review were allowed to proceed ([2001] F.C.J. No. 282; [2001] F.C.J. No. 283 (QL) (F.C.A.)). An application for leave to appeal to the Supreme Court of Canada has been filed.

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

File Nos.: A-674-00; A-675-00

References: [2000] F.C.J. No. 1822 (QL) (F.C.A.)

Date of Decision: November 8, 2000

Before: Noël J.A. (F.C.A.)

Section(s) of *ATIA/PA*: Ss. 2(1), 36(1)(a), 63(1) *Access to Information Act (ATIA)*

Abstract

- Records within Prime Minister's and Minister of National Defence's offices
- Subpoenas issued by Information Commissioner
- Interim relief prohibiting enforcement of subpoenas
- Motion to stay judicial review applications
- Tripartite test met: serious issue, irreparable harm and balance of convenience

Issue

Can the Federal Court of Appeal Court grant the Information Commissioner's motion to stay the judicial review applications against the subpoenas issued by the IC on the ground that the records held in the Prime Minister's office and the office of the Minister of National Defence do not fall within the *ATIA*?

Facts

Noël J.A. acknowledged the facts as set out by McKeown J. in the Trial Division ([2000] F.C.J. No. 1648 (QL)). These are as follows:

The Privy Council Office (PCO): In June 1998, PCO received six access requests – one of which sought the release of the Prime Minister’s daily agenda book for the years from 1994 to date. The Prime Minister’s daily agenda was kept and exclusively archived in electronic format in the PM’s office. Up until approximately twelve months ago, it was the Prime Minister’s Executive Assistant’s practice to fax a copy of the next day’s agenda to the Clerk of the Privy Council. That copy was provided for the sole information of the Clerk of the Privy Council and his or her executive assistant. The agenda was discarded after it was used that day. As such, the only archived copy of the PM’s agenda was in the PM’s office. In addition, a copy of the agenda showing only the locations to be visited by the PM was also made available to the RCMP. PCO neither confirmed nor denied the existence of any records relating to the subject matter of the request, but stated that, should they exist, they would be exempt in their entirety as being personal information, pursuant to subs. 19(1) of the *ATIA*. The requester filed a complaint with the Information Commissioner’s office. The Deputy Commissioner, in a letter to the PM’s Chief of Staff, indicated his concern that the PM was of the view that his office was not subject to the *ATIA*. Following this letter, a subpoena was issued to Bruce Hartley, an exempt staff member in the PM’s office.

The Department of National Defence (DND): In November 1999, DND received an access request for minutes or documents produced from the M5 management meetings for 1999. “M5” was the term used to describe the informational meetings among the Minister of National Defence, his senior exempt staff, the Deputy Minister and the Chief of Defence Staff. In February 2000, the acting Director of Access to Information and Privacy at DND advised the requester that a search had failed to uncover any documents fitting the description in his request. The requester filed a complaint with the Information Commissioner’s office.

Upon a further search for documents under the control of DND, some materials were provided to the Commissioner's office but the Assistant Deputy Minister refused to disclose or remit the notebooks of the three applicants stating that "these notes are not filed or circulated, nor are they under the control of the Department". Subpoenas were issued to three of the DND Minister's exempt staff to appear before him and produce all records generated, used or obtained during the course of their duties, including notebooks containing information with respect to any and all DND M5 management meetings. The notebooks were not part of the records management system of the Minister's office, nor had they been included in the records management system of DND. They were not shared with anyone in the Minister's Office.

The Attorney General of Canada and the individuals who received subpoenas brought applications for judicial review to the Federal Court seeking a declaration that records held exclusively in the office of the Minister of DND and in the PM's office are not under the control of DND or PCO respectively.

The Attorney General of Canada and the individuals who has been served subpoenas sought motions prohibiting the Information Commissioner from requiring them to give evidence or produce documents from both the Prime Minister's Office and the Minister of National Defence's Office until such time as the Federal Court entertains the applications for judicial review. The Information Commissioner sought to strike out the applications for judicial review on the basis of their prematurity.

The Federal Court Trial Division granted the applicants' motions for interim relief ([2000] F.C.J. No. 1648 (QL)) and dismissed the Information Commissioner's motion to strike out the applications for judicial review. The Information Commissioner has filed for appeal of that decision¹ and now moves for an order staying the judicial review applications pending before the Trial Division as well as that part of McKeown's order which provides for the applications for judicial review to proceed on an expedited basis.

Decision

The Federal Court of Appeal granted the appeal. The applications for judicial review regarding the applicability of the *ATIA* to the Prime Minister's office and the office of the Minister of National Defence were stayed until final determination of the Information Commissioner's appeal against the order of McKeown J.

Reasons

The Information Commissioner met the tripartite test favouring the grant of the stay: serious issue to be tried, irreparable harm and balance of convenience.

Serious issue to be tried

The Federal Court of Appeal was of the view that there was a serious issue to be raised: that it was at least arguable, having regard to the purpose and scheme of the *ATIA*, that Parliament intended the process created thereunder to govern the disclosure (or non-disclosure) of the information in issue in this appeal to the exclusion of the process chosen by the respondents and sanctioned by the Motions Judge.

The Trial Division had held that the jurisprudence of the Court clearly establishes that this type of issue ought to be dealt with on the merits of the judicial review application and not on a motion to strike. The Court of Appeal held that this rule was not absolute and that a party could seek to quash a judicial review application by a motion to strike where he or she can show that the application is so clearly improper as to be bereft of any possibility of success.

The Court of Appeal was satisfied that the Information Commissioner had met the first requirement.

Irreparable Harm

The Court of Appeal recognized that in the absence of a stay, the Information Commissioner would be prevented from exercising his statutory duty and the Trial Division would end up determining the faith of the information at the heart of the complaint outside the process contemplated by law, that is without the benefit of the Commissioner's investigation, his findings and recommendations. The Court held that the harm resulting from the failure to exercise a duty mandated by statute in circumstances where that duty ought to have been exercised is by definition irreparable; it is harm which cannot be cured.

Balance of Convenience

The Court of Appeal recognized that the balance of convenience favoured the Information Commissioner's position by stating that "if the stay is granted and the respondents' position is upheld on appeal, nothing will be lost as the order of prohibition against the enforcement of the subpoena remains in force in the interim. If, on the other hand, the judicial review application is allowed to proceed before the Trial Division and the Commissioner eventually prevails on appeal, he will be denied the exercise of the statutory role which the Act confers upon him." Justice Noël echoed sentiments previously expressed by the Supreme Court of Canada in *RJR MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311, that "... courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect."

¹ The Federal Court of Appeal rendered its decision on March 1, 2001 ([2001 F.C.J. No. 282; [2001] F.C.J. No. 283 (QL) (F.C.A.)).

CONNELLY V. CANADA POST CORP.**INDEXED AS: CONNELLY V. CANADA (CANADA POST CORP.)**

File No.:	T-1593-99
References:	[2000] F.C.J. No. 1883 (QL) (F.C.T.D.)
Date of Decision:	November 20, 2000
Before:	MacKay J. (F.C.T.D.)
Section(s) of ATIA/PA:	Ss. 41, 48 and 49 <i>Privacy Act (PA)</i>

Abstract

- Court's jurisdiction under s. 41 *PA*
- No common law or statutory remedy for late release of information or for damages

Issue

Does the Court have jurisdiction to review the manner in which Canada Post dealt with the request for access?

Facts

Mr. Connolly made an access request under the *Privacy Act* in September 1996, which request was denied by Canada Post. The Privacy Commissioner's intervention resulted in a partial disclosure of some of the requested information in February, May and June 1998. Some of the information continued to be withheld.

In a letter dated April 1999, the Commissioner advised Canada Post that he was of the opinion that the requester's *Privacy Act* rights had been contravened and recommended the release of the balance of the information. In May 1999, Canada Post released the balance of the information, to the exception of

information that was not personal information concerning the requester. Mr. Connolly filed a judicial review application under s. 41 of the *PA* following a letter from the Privacy Commissioner dated July 20, 1999 that stated he could obtain “a review of the manner in which Canada Post dealt with your request”.

Mr. Connolly, who is not a lawyer, represented himself in this application for review. At the hearing, he offered to file an application record. Counsel for the respondent objected to such a late filing and the Court denied the possibility of such a filing as contrary to the Court’s practice. The applicant used his prepared record as the basis of his oral submissions.

Decision

The application for judicial review was dismissed.

Reasons

The Court’s authority to review the refusal to provide access to information is set out in s. 41 *PA*, which must be read together with ss. 48 and 49 *PA*. This authority is limited to ordering access where it has been wrongfully refused. At the time he filed his application, Mr. Connolly had received disclosure of all the information requested to which he was entitled under the *PA*. The Court thus considered it had no jurisdiction to order any remedy. It stated:

“The Court could not order more than that. It has not authority under the Act to review the process of denial and order any redress where there has been ultimate release of the information requested.”

Consequently, it could not be said that the *Privacy Act* rights of Mr. Connolly continued to be violated since he had received all information sought to which he was allowed under the Act.

The Court went on to note that there is no common law remedy for wrongly withholding publicly held personal information to a requester. There is also no common law or statutory right for damages. The Court was therefore unable to allow compensation as requested by Mr. Connolly. The Court also denied Mr. Connolly's request for an order, at large, for the release of "all Privacy request for personal information pursuant to all sections of the Canadian *Privacy Act*" without reference to a particular case.

The Court concluded that it had no remedy to offer Mr. Connolly for the delay encountered in receiving disclosure of his personal information from the respondent.

The award of cost sought by Mr. Connolly was denied.

ATTORNEY GENERAL OF CANADA V. DANIEL-MARTIN BELLEMARE
INDEXED AS: BELLEMARE V. CANADA (ATTORNEY GENERAL)

File No.:	A-598-99
References:	[2000] F.C.J. No. 2077 (QL) (F.C.A.)
Date of Decision:	November 30, 2000
Before:	Décary, Létourneau and Noël JJ.A. (F.C.A.)
Section(s) of ATIA/PA:	S. 41 <i>Access to Information Act (ATIA)</i>

Abstract

- Requests for access to information granted in part
- Judicial review of Information Commissioner's decisions dismissing complaints
- Time limit under s. 41 *ATIA*
- Court without jurisdiction to conduct review of Information Commissioner's findings and recommendations

Issue

Did the Motions Judge err in failing to strike out the respondent's application for judicial review against decisions of the Information Commissioner dismissing the respondent's complaints?

Facts

The respondent filed two access requests with the Department of Justice (DOJ) seeking, with respect to the first one, access, *inter alia*, to a list of lawyers who had participated in the Interchange Canada Program and, with respect to the second one, access to information pertaining to lawyers who had at some time worked for Industry Canada Legal Services. (Part of the second request was

transferred to Industry Canada.) Both requests were partially granted. The respondent filed complaints with the Information Commissioner claiming that all of the requested documents had not been disclosed. With respect to the second request, the respondent also argued that some documents that were disclosed in response thereof were documents that DOJ had failed to disclose in the first request on the basis that they had been destroyed in accordance with the policy respecting the destruction of documents.

The Information Commissioner (IC) dismissed the complaint relating to the first request on March 10, 1998 and the complaint relating to the second request on May 28, 1999. The respondent thereupon filed an application for judicial review on June 21, 1999 seeking (i) review of the Information Commissioner's decision of March 10, 1998 and (ii) review only of the portion of the May 28, 1999 decision pertaining to his first request. Before the application was heard, the appellant (Attorney General) moved to have it struck on the basis that it had been filed beyond the time period contemplated by s. 41 of the *ATIA*. The motion to strike was granted in part. Pinard J. ordered that the portion of the application for judicial review pertaining to the March 10, 1998 decision be dismissed on the ground that it was not filed within the 45-day time limit but that the portion of the application pertaining to the May 28, 1999 decision be allowed to continue (T-1073-99, order dated September 16, 1999). The Attorney General has appealed this decision arguing that Pinard J. erred in refusing to strike the application in its entirety.

Decision

The appeal was allowed, the decision of the Motions Judge set aside and the respondent's application for judicial review struck in its entirety.

Reasons

With respect to the issue of the time limit, the Court was satisfied that, although the IC's decision of May 28, 1999 referred by file number to the second request only, it also reconsidered and purported to dispose anew of the respondent's first request having regard to the new arguments that were raised in the second request. To that extent, it was open to the Motions Judge to hold that the application could continue against the May 28, 1999 decision.

However, the Court held that the respondent could not be allowed to continue with his application since the latter was erroneously directed against decisions of the Information Commissioner. The *ATIA* as a whole and, in particular, ss. 7, 19, 43, 48, 49 and 50 make it clear that it is the government institution concerned, and not the Information Commissioner, which is called upon to justify the refusal. As stated in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D.), "Since the Commissioner's recommendations are not legally binding the decision reviewed by the Federal Court under section 41 is the Minister's not the Information Commissioner's." The Court is therefore without jurisdiction, under s. 41 *ATIA*, to conduct a review of the IC's findings and recommendations.

LES VIANDES DU BRETON INC.
V. DEPARTMENT OF AGRICULTURE AND AGRI-FOOD
INDEXED AS: VIANDES DU BRETON INC.
V. CANADA (DEPT. OF AGRICULTURE AND AGRI-FOOD)

File No.: T-1819-98

References: [2000] F.C.J. No. 2088 (QL) (F.C.T.D.)

Date of decision: December 15, 2000

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

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

Abstract

- Judicial review of decision to disclose inspection reports concerning a food establishment
- Test for application of paras. 20(1)(c) and (d) *ATIA*
- Absence of reasonable expectation of probable harm

Issue

Did the applicant successfully show that paras. 20(1)(c) and (d) *ATIA* apply to the inspection reports concerning its establishment?

Facts

The applicant, which operates a pork slaughterhouse and meat-packing plant, is seeking judicial review of the defendant's decision to disclose inspection reports concerning its establishment on the grounds that the tests for application of the exemptions provided for in paras. 20(1)(c) and (d) *ATIA* were met. The applicant contends that it showed that disclosure of the inspection

reports on its establishment would probably cause it material financial loss, prejudice its competitive position and interfere with ongoing contract negotiations.

Decision

The application for judicial review was dismissed. If no appeal is filed, the inspection reports shall be disclosed to the party requesting access once the appeal period expires.

Reasons

The onus is on the applicant to show that the documents should not be disclosed. The applicant must therefore put forward evidence of a reasonable expectation of probable harm. The Court took note of previous decisions ordering the disclosure of inspection reports similar to those in the case at bar. It also embraced the comments made by Pinard J. in *Coopérative fédérée du Québec (c.o.b. under the name of Aliments Flamingo) v. Canada (Agriculture and Agri-Food)* (2000), 5 C.P.R. (4th) 344 (F.C.T.D.). The Court is of the opinion that the applicant did not meet the test of reasonable expectation of probable harm, financial or otherwise, for the following reasons: there was no tangible evidence of the financial implications of disclosure (no discussion of the method of calculation used or the source of the figures presented); the reports deal only with the physical condition of the establishment, not the quality of the product, describe only the condition of the establishment at the time of the inspection in 1997, and do not necessarily reflect the condition of the establishment today; corrective measures have been taken; and the Department's decision includes an explanatory note intended to eliminate any doubt as to the nature of the reports in question and indicating how they should be interpreted. Moreover, the applicant's fear of unfair or adverse media coverage of the content of the reports does not justify non-disclosure of the reports. The Court notes that the applicant has other means of legal recourse should it fall victim to such coverage.

**ANDERSEN CONSULTING V. HER MAJESTY THE QUEEN
INDEXED AS: ANDERSEN CONSULTING V. CANADA**

File No.:	T-1096-95
References:	[2001] F.C.J. No. 57 (QL) (F.C.T.D.)
Date of Decision:	January 19, 2001
Before:	Hugessen J. (F.C.T.D.)
Section(s) of <i>ATIA/PA</i> :	Ss. 2 and 4 <i>ATIA</i>
Other legislation:	Ss. 2, 4 and 5 <i>National Archives of Canada Act (NACA)</i>

Abstract

- Litigation; discovery
- Implied undertaking
- Notion of control
- Interpretation of the *ATIA* and *NACA*

Issue

Is there an obligation on the Crown to return or destroy documents obtained, through discovery, under the implied undertaking rule?

Facts

Andersen Consulting brought a motion for the return or destruction of a very large number of documents which were copied by it and turned over to the defendant through the discovery process in an action for breach of contract between the parties. That action was settled before trial by the payment of an undisclosed amount to Andersen Consulting. These documents were therefore never produced or part of the Court's public record.

Following settlement of the action, the solicitors for the two parties entered into correspondence regarding the documents. Lawyers for the Department of Justice sought Andersen Consulting's instructions regarding the documents obtained from them, but subsequently informed Andersen that these documents could neither be returned nor destroyed and that the Department of Justice had a statutory obligation to retain them pursuant to the *National Archives of Canada Act*. The defendant also maintained that these documents were to be turned over to the National Archives.

Andersen made representations to this Court stating that the documents involved sensitive commercial information and did not want these documents to be made available to its competitors through the *Access to Information Act*. An interim conservatory order was made, placing the documents under the Court's protection until Andersen's motion was decided upon.

Decision

The order sought was granted and the defendant ordered to return "all documents obtained by the defendant on discovery and not forming part of the public record" within ten (10) days.

Reasons

The documents at issue were handed to the defendant under the terms of the implied undertaking rule. According to this rule, documents obtained for the purpose of discovery are to be used for the sole purpose of the undergoing action and are not to be disclosed or used for any other purposes, unless and until they become part of the Court's public record.

The undertaking is imposed by the Court and may be enforced through the use of the contempt power. Hugessen J. is of the view that the undertaking usually includes an obligation for the party who receives the documents to return or destroy them at the conclusion of the litigation. In his reasons, Hugessen J. considers that in the past, all parties including the Crown, have routinely returned or destroyed documents obtained through discovery which were not used in evidence.

The Court was of the view that the caselaw developed under the *Access to Information Act* with respect to the notion of control was not helpful in this case. Justice Hugessen stated:

“In my view, and despite the similarity of the statutory language, the cases under the *Access to Information Act* are not governing. The two statutes [i.e. the *ATIA* and the *NACA*] are not *in pari materia*. Their objectives are different, the one being to provide for access by the public to the workings of an open and accountable government and the other being to ensure that a historical record of government operations is preserved.”

The Court went on to note at para. 17:

“More important, the cases under the *Access to Information Act* do not deal with a situation where the law itself imposes a condition upon the government institution which receives a document. This is critical. Documents received by Justice in the discovery process are not subject to a merely voluntary condition. Lawyers for the Crown do not have the option of refusing to give the implied undertaking: by accepting the documents they are bound towards the Court to deal with them only in the way permitted by the undertaking [...] Furthermore, the undertaking extends not only to the documents themselves but, much more significantly, to all information obtained as a result of the discovery process, e.g. through answers to oral questions. The Court in extracting

the undertaking is concerned not so much with the documents as pieces of paper but rather, and significantly, with the information they may contain. That information is to remain private unless and until it comes out in open Court. While the point does not arise for decision herein, I seriously doubt that it could be called 'government information'. It is not in the government's control because that latter's possession of it is constrained and restricted by law."

Hugessen J. also rejected the argument of ownership in the chattel, i.e. ownership in the documents copied. The documents, at least at one point, belonged to Andersen. It could not be inferred from the fact that the settlement payment included a sum for costs that the property of these documents was thereupon transferred to the defendant. Hugessen J. concluded that in balancing the rights of property and of privacy, the latter must prevail.

**INFORMATION COMMISSIONER OF CANADA
V. ATTORNEY GENERAL OF CANADA, MERIBETH MORRIS, RANDY MYLYK AND
EMECHETE ONUOHA AND DAVID PUGLIESE;
INFORMATION COMMISSIONER OF CANADA
V. ATTORNEY GENERAL OF CANADA AND BRUCE HARTLEY
INDEXED AS: CANADA (ATTORNEY GENERAL)
V. CANADA (INFORMATION COMMISSIONER)**

File Nos.: A-674-00; A-675-00

References: [2001] F.C.J. No. 282; [2001] F.C.J. No. 283 (QL)
(F.C.A.)

Date of Decisions: March 1, 2001

Before: Richard C. J., Noël and Evans J.J.A. (F.C.A.)

Section(s) of ATIA/PA: Ss. 2(1), 35, 61, 62, 63(1), 64(a) *Access to
Information Act (ATIA)*

Abstract

- Records within Prime Minister's and Minister of National Defence's offices
- Subpoenas *duces tecum*¹ issued by Information Commissioner
- Appeal from order prohibiting enforcement of subpoenas allowed
- Judicial review applications allowed to proceed on the issue of whether documents in a Minister's office are under the control of a government institution

Issues

- (1) **Applications for judicial review** – Whether the Motions Judge (McKeown J.) erred when he dismissed the Information Commissioner's motion to strike out the respondents' applications for judicial review on the issue of whether

or not records in the office of Prime Minister and the office of the Minister of National Defence were under the control of a government institution for the purposes of the *ATIA*.

(2) **Subpoenas *duces tecum*** – Whether the Motions Judge (McKeown J.) erred when he granted the respondents’ motion for interim relief prohibiting the Information Commissioner from enforcing subpoenas *duces tecum* until the final determination of the applications for judicial review.

Decision

The applications for judicial review were allowed to proceed and McKeown J.’s order prohibiting the Information Commissioner from requiring certain members of the Prime Minister’s and the Minister of National Defence’s exempt staff to attend, to give evidence and to bring with them certain documents pursuant to the subpoenas is set aside.

Facts

The relevant facts were set out by McKeown J. in the Trial Division ([2000] F.C.J. No. 1648 (QL) (F.C.T.D.)). They are as follows:

The Privy Council Office (PCO): In June 1998, PCO received six access requests – one of which sought the release of the Prime Minister’s daily agenda book for the years from 1994 to date. The Prime Minister’s daily agenda was kept and exclusively archived in electronic format in the PM’s office. Up until approximately twelve months ago, it was the Prime Minister’s Executive Assistant’s practice to fax a copy of the next day’s agenda to the Clerk of the Privy Council. That copy was provided for the sole information of the Clerk of the Privy Council and his or her executive assistant. The agenda was discarded after it was used that day. As such, the only archived copy of the PM’s agenda was in the PM’s office. In addition, a copy of the agenda showing only the locations to be visited by the PM was also made available to the RCMP. PCO neither confirmed nor denied the existence of any records relating to the

subject matter of the request, but stated that, should they exist, they would be exempt in their entirety as being personal information, pursuant to subs. 19(1) of the *ATIA*. The requester filed a complaint with the Information Commissioner's office. The Deputy Commissioner, in a letter to the PM's Chief of Staff, indicated his concern that the PM was of the view that his office was not subject to the *ATIA*. Following this letter, a subpoena was issued to Bruce Hartley, an exempt staff member in the PM's office.

The Department of National Defence (DND): In November 1999, DND received an access request for minutes or documents produced from the M5 management meetings for 1999. "M5" was the term used to describe the informational meetings among the Minister of National Defence, his senior exempt staff, the Deputy Minister and the Chief of Defence Staff. In February 2000, the acting Director of Access to Information and Privacy at DND advised the requester that a search had failed to uncover any documents fitting the description in his request. The requester filed a complaint with the Information Commissioner's office.

Upon a further search for documents under the control of DND, some materials were provided to the Commissioner's office but the Assistant Deputy Minister refused to disclose or remit the notebooks of the three applicants stating that "these notes are not filed or circulated, nor are they under the control of the Department". Subpoenas were issued to three of the DND Minister's exempt staff to appear before him and produce all records generated, used or obtained during the course of their duties, including notebooks containing information with respect to any and all DND M5 management meetings. The notebooks were not part of the records management system of the Minister's office, nor had they been included in the records management system of DND. They were not shared with anyone in the Minister's Office.

The Attorney General of Canada and the individuals who received subpoenas brought applications for judicial review to the Federal Court seeking a declaration that records held exclusively in the office of the Minister of DND and in the PM's office are not under the control of DND or PCO respectively.

The Attorney General of Canada and the individuals who had been served subpoenas sought motions prohibiting the Information Commissioner from requiring them to give evidence or produce documents from both the Prime Minister's office and the Minister of National Defence's office until such time as the Federal Court entertains the applications for judicial review. The Information Commissioner sought to strike out the applications for judicial review on the basis of their prematurity.

The Federal Court Trial Division (McKeown J.) granted the applicants' motions for interim relief ([2000] F.C.J. No. 1648 (QL)) and dismissed the Information Commissioner's motion to strike out the applications for judicial review. This is an appeal by the Information Commissioner of that decision.

Reasons

Issue 1: Judicial Review Applications

The *ATIA* does not expressly or by necessary implication oust the Court's jurisdiction under s. 18.1 of the *Federal Court Act* to grant a declaration on an application for judicial review as to whether or not the records sought are "under the control of a government institution" within the meaning of the *ATIA* and hence subject to the right of access created by that Act.

The Court recognized that there was sufficient evidence before the Motions Judge which enabled him to conclude that the judicial review applications give rise to a serious issue, namely whether the Prime Minister's office and that of the National Defence Minister fall within the meaning of "government institution" for the purposes of the *ATIA*.

Issue 2: Subpoenas *duces tecum*

First, while subs. 63(1) is a general provision that authorizes the disclosure of any information for the stated purposes, the Motions Judge did not acknowledge nor did he refer to other provisions in the *ATIA* that protect information from being disclosed. In particular, the Federal Court of Appeal referred to para. 64(a) which specifically prohibits the Information Commissioner from disclosing specific information with respect to which an exemption can be claimed under the *ATIA*.

The Court stated that “The general authority to disclose information under subs. 63(1) and the prohibition enacted by para. 64(a) with respect to information coming under an exemption cannot both operate at once.” The Court further added that:

The rule for resolving a conflict between a general enactment and a particular enactment within the same statute has long been established:

The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. (Pretty v. Solly (1859), 26 Beav. 606, 53 E.R., 1021 at 1034)

As such, the Court held that para. 64(a) had to be construed as excluding the application of subs. 63(1) insofar as the information specified therein is concerned. It was incumbent upon the Motions Judge to consider the effect of para. 64(a).

The Court added that the exemptions which the Commissioner must be mindful of in complying with para. 64(a) are far reaching and cover all unwarranted disclosures which the respondents can reasonably apprehend from compliance with the subpoenas having regard to the type of information that is sought. The

Court was also of the view that it would be contrary to the scheme of the *ATIA* for the Commissioner to disclose information gathered in the course of his investigation. Section 35 requires the Commissioner's investigations to be conducted in private before officers who must, according to s. 61, meet security requirements and s. 62 prohibits the Commissioner and person acting on his behalf from disclosing any information that comes to their knowledge in the performance of their duties.

Second, the fact that irreparable harm may arguably arise does not establish irreparable harm. The respondents would have had to prove, on a balance of probabilities, that irreparable harm would result from compliance with the subpoenas – which they did not. The Court stated that it could not be seriously argued that irreparable harm would flow from having an authorized officer from the Information Commissioner's office review the sought information with the view of ensuring that personal information and other exempt information is protected from disclosure. The fact that harm may arise was not sufficient for the Court. The alleged harm can not be speculative or hypothetical. The Court stated that "In the absence of such harm, this balance dictates that the Commissioner's investigation be allowed to continue and the subpoenas complied with, pending the outcome of the judicial review application."

The Court was of the view that "to the extent that the reasons of the Motions Judge can be read as holding that it is arguable that the individual respondents have not relevant evidence to give in answer to the subpoenas issued by the Commissioner because they swore that the information in their possession is not under the control of a government institution, he was in error." The Court held that whatever views the individual respondents may have about where control of the documents lies, it is not for them to decide where control lies for the purposes of the *ATIA*. The Court was of the view that the subpoenas had been issued for a bona fide purpose and thus could not be set aside merely because the individual respondents believed that they had no relevant evidence to give.

Comments

An application for leave to appeal to the Supreme Court of Canada has been filed.

¹ A subpoena duces tecum is a document requiring a witness to give evidence in court or before an examiner and also to bring along documents specified in the subpoena.

**INFORMATION COMMISSIONER OF CANADA
V. COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE AND
PRIVACY COMMISSIONER OF CANADA
INDEXED AS: CANADA (INFORMATION COMMISSIONER)
V. CANADA (ROYAL CANADIAN MOUNTED POLICE)**

File No.: A-820-99

References: [2001] F.C.J. No. 344 (QL) (F.C.A.)

Date of Decision: March 13, 2001

Before: Décary, Létourneau and Noël JJ.A. (F.C.A.)

Section(s) of *ATIA/PA*: Ss. 19 and 49 *Access to Information Act (ATIA)*, ss. 3(b), 3(j) and 8(2)(m) *Privacy Act (PA)*

Abstract

- Public servants' personal information
- Employment history

Issues

- (1) Did the Motions Judge err when he concluded that subpara. 3(j)(i) of the *PA* and subs. 19(1) of the *ATIA* authorize only the disclosure of a public servant's current position or the position last held by a former public servant and, therefore, prohibit the disclosure of past positions?
- (2) Should the Motions Judge, after having concluded that the information was protected, have himself proceeded to exercise the discretion under subs. 19(2) and assess, under subpara. 8(2)(m)(i) of the *PA*, whether the public interest in disclosure clearly outweighed any invasion of privacy that could result from the disclosure?

Facts

In June 1998, the RCMP received an access request for postings, past and present, of four named officers, the copies of all public complaints filed against each of them and the “name and address for service of member or former member” who served in the RCMP detachment of Baddeck, Nova Scotia in August 1986.

In July 1998, the RCMP exempted all information from disclosure under subs. 19(1) of the *ATIA*. The institution concluded that the information in question related to the employment history of the officers. Therefore, the information was personal information pursuant to s. 3 of the *PA*.

The requester complained in July 1998 to the Information Commissioner (IC). After investigation, the RCMP agreed in October 1998, to release information concerning the current postings and positions of the four RCMP officers and the last posting and position of the RCMP officer who had served in Baddeck prior to his retirement.

In January 1999, the IC asked the RCMP to disclose all the information identified in the request claiming that this information was exempted from the definition of personal information by virtue of subpara. 3(j) of the *PA*.

The Trial Division ((1999), 179 F.T.R. 75) was of the view that the information requested was personal information and was therefore exempt from disclosure in accordance with subs. 19(1) of the *ATIA*. The Court held that the respondent failed in his exercise of discretion required under subs. 19(2) of the *ATIA* and ordered the respondent to consider whether the information should be released pursuant to subpara. 8(2)(m)(i) of the *PA*.

The Information Commissioner appealed this decision to the Federal Court of Appeal.

Decision

The appeal was dismissed.

Reasons

Issue 2

The Court of Appeal dealt with the second question first. The Court saw no error in the decision of the Motions Judge to refer the matter to the RCMP Commissioner for an initial balancing of the public interest against an invasion of privacy resulting from disclosure of personal information pursuant to subs. 19(2) of the *ATIA* and subpara. 8(2)(m)(i) of the *PA*. The Court recognized that the federal institution is in a better position than the Court to make the initial determination as to privacy as well as the initial balancing of the privacy interest against the public interest which included the needs of the institution.

The exercise of the discretionary power under subs. 19(2) of the *ATIA* had not been affected by the opposing interest between the requesting party and the federal institution.

In the present case, there was no evidence of bad faith, obstruction or improper motives which could have justified the imposition of safeguards by the Motions Judge. In addition, no request for a special order under s. 49 *ATIA* or for an order assorted with conditions had been made to the Motions Judge.

Issue 1

The Court was of the view that subpara. 3(j) authorizes the release of information about an individual's position, whether it be current or past. However, the Court added that a request about a named individual's position, especially in respect of the past positions held, has to be specific as to time, scope and place. According to the Court,

It [the request] cannot be a fishing expedition about all or numerous positions occupied by an individual within the Government over the span of his employment as it becomes, in fact, a request about that individual's employment history.

In the present instance, the Court concluded that the access request, when assessed in its totality and in relation to its primary focus, was about specific individuals' employment history, not a current or specific past position. The Court recognized that "employment history" is not defined in the *PA*. The Court offers the following comment:

I confess that it is not and will not always be easy to determine when a request for an information about an individual's position as authorized by subparagraph 3(j) ceased to be so to become a request about that individual's "employment history".

The posting (i.e. the place of work) of an employee, the list of ranks and the dates these ranks were achieved, the years of service and the anniversary date of service are not information related to an individual's position as the terms of subpara. 3(j) stipulate. In addition, the Court felt that because the request was unlimited in time and unspecified, its primary focus became a search for personal information.

Comments

The Information Commissioner has sought leave to appeal to the Supreme Court of Canada.

**INFORMATION COMMISSIONER
V. MINISTER OF CITIZENSHIP AND IMMIGRATION AND PHILIP W. PIRIE
INDEXED AS: CANADA (INFORMATION COMMISSIONER)
V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)**

File No.: T-1569-99

References: [2001] F.C.J. No. 429 (QL) (F.C.T.D.)

Date of Decision: March 22, 2001

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

Section(s) of *ATIA/PA*: Ss. 19, 20(1)(c), (d) *Access to Information Act (ATIA)*; ss. 3(e), (f), (i), (j), 8(2) *Privacy Act (PA)*

Abstract

- Review, by consultant, of workplace environment following allegations of discrimination and harassment
- Names of individuals interviewed: personal information of interviewees or of requester
- Distinction between employees with responsibility to prevent harassment and those without such responsibility: former's names within para. 3(j) *PA* while latter's relating primarily to individuals themselves
- Analysis of exercise of discretion under subs. 19(2) *ATIA*

Issues

- (1) Whether the respondent discharged its burden of establishing that it was authorized to refuse disclosure on the basis of subs. 19(1) *ATIA*?
- (2) Whether the respondent properly considered subs. 19(2) *ATIA* and subpara. 8(2)(m)(i) *PA*?

(3) Whether the respondent was authorized to refuse disclosure on the basis of paras. 20(1)(c) and (d) *ATIA*?

Facts

This is an application for judicial review against the refusal of CIC to provide the requester with the names of individuals interviewed and with the opinions expressed by them about him where disclosure of such opinions would identify those individuals.

Allegations of discriminatory behaviour and harassment at CIC's Case Processing Centre (CPC) in Vegreville, Alberta, prompted CIC to request that TLS, an independent consultant, conduct an administrative review of the corporate culture in the CPC. Prior to the interviews, staff were advised that the interviews would be confidential and that TLS had an agreement with CIC that TLS would maintain notes of the interviews, but would not pass the content of the interviews on to anyone in CIC. TLS' report was to be a summary of its findings and no remarks were to be attributed to any individual.

CIC was provided with the final report on July 1, 1996. The requester, then Director of the CPC at Vegreville, was provided with a copy of the report on July 10, 1996. He was advised, on the same day, that he was relieved of his duties as Director and was also told that in view of the problems identified in the report, a position previously offered to him was withdrawn.

The requester submitted an access request under the *ATIA* for "all written records including notes from interviews" related to the administrative review conducted by TLS. CIC released some records containing opinions expressed by others about the requester. The names of persons interviewed along with information about their position at CPC were not disclosed. Similarly, where disclosure of the information would reveal the identity of the interviewee, any information about the interviewee that was intertwined with the views or opinions of the interviewee about the requester was severed from the records disclosed to the latter.

Decision

The application for judicial review was allowed in part. The names and opinions of the individuals interviewed – where such opinions would identify those individuals – were not to be released to the requester, with the exception of the names and opinions of those managers who were interviewed and who had the responsibility to prevent harassment in the workplace or to administer a harassment policy.

Reasons

Issue 1

The Court started by reiterating the principle enunciated in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 that the definition of “personal information” is expansive and the general opening words of that definition are intended to be the primary source of interpretation. This expansive definition had the following consequences: an individual’s views or opinions about the requester and the fact that it was that individual’s view or opinion would be personal information of the requester. In addition, the fact of the holding of the opinion and the opinion itself would also be personal information of the individual who expressed the opinion, if that individual was identifiable.

That being said, the Court found it necessary to review the specific paragraphs of the definition to ensure that the conclusion above was in conformity with the balance of the definition. The Court noted that while paras. 3(e) and 3(g) dealt with the substance of an individual’s opinions or views, they were silent as to the fact that it is the view or opinion of an identifiable individual.

The Court went on to examine para. 3(i) which deals expressly with an individual's name. The Court held that because a person's opinion about the requester was not that person's personal information, the name of the holder of the view or opinion was not *per se* the holder's personal information based on the first branch of para. 3(i) ("where it [the name] appears with other personal information").

Under the second branch of para. 3(i) ("where the disclosure of the name itself would reveal information about the individual"), the name of the holder of the view or opinion is that person's personal information where the disclosure of the person's name itself would reveal information – not necessarily personal information – about that person. In the case at bar, the Court held that disclosure of the names of those persons who held views or opinions about the requester would reveal information about them. Given that not all individuals employed at the CPC participated in the review, the information revealed would be that such individuals participated in the administrative review. The Court rejected the Information Commissioner's argument that the absence in para. 3(g) of any reference to the exclusion of a person's name (unlike the situation in para. 3(h)) indicated that an identifiable individual may not anonymously express an opinion or view about another individual. The Court was of the view that this method of statutory interpretation was not applicable where the general opening words of the definition were intended to be the primary source of interpretation and the subsequent enumeration merely exemplifiers.

The Court then turned to the question of whether the exception to the definition of personal information found in para. 3(j) applied. In considering the applicability of para. 3(j), the Court distinguished between those employees who were managers with certain responsibilities and functions, and those who were not. The evidence showed that "[w]here it was clear that it was the role of an individual, mostly at headquarters, to prevent harassment in the workplace, their identity has been revealed" by CIC. The release was justified on the Minister's behalf because in all cases the names and notes released were in

respect to “managers” with responsibility to prevent harassment in the workplace or to administer the harassment policy. The information was thus viewed to be opinions or views given in the course of employment. The correctness of that view was not challenged in the course of the proceedings.

With respect to those individuals whose names and opinions had not been disclosed to the requester and who had the responsibility, at the CPC in Vegreville, to prevent harassment in the workplace or to otherwise administer a harassment policy, the Court found that the Minister had failed to meet the onus of proving that the information did not fall within para. 3(j).

With respect to employees of the CPC without responsibility for preventing harassment, the Court concluded that their names were not information attaching to their position or function, but rather were information relating primarily to the individuals themselves and therefore, did not fall within para. 3(j). In coming to that conclusion, the Court took into account the fact that: (a) the TLS report also dealt with racism, an issue which “goes well beyond workplace issues”; (b) former employees were interviewed; (c) participation in the interviews was voluntary, notwithstanding that some employees were invited to participate; (d) the names of the persons interviewed were not provided to CIC until after the requester’s complaint, which indicated that their names were not required for any work-related purpose.

Issue 2

The evidence showed that the Minister’s delegate considered the exceptions under s. 19 *ATIA* and determined that none of the provisions of s. 8 *PA* applied. The Court rejected the Information Commissioner’s assertion that the requester was limited in his ability to refute the comments made about him in the report. The evidence showed that the requester was provided with the opportunity to provide written representations in response to the TLS report to the Deputy Minister. The evidence also showed that when exercising her discretion, the Minister’s delegate knew that the non-disclosed notes were not used against

the requester because they were not in the possession of the Department until after the requester had filed a complaint. The Court therefore concluded that the exercise of discretion under subs. 19(2) *ATIA* had been proper.

Issue 3

The letter from a principal of TLS, which was attached as an exhibit to the affidavit of the Minister's delegate, was found to be inadmissible hearsay evidence. There was therefore insufficient evidence of a reasonable expectation of probable harm for disclosure to be withheld under paras. 20(1)(c) and (d) *ATIA*.

Comments

The Information Commissioner is appealing this decision. The Crown is cross-appealing.

**INFORMATION COMMISSIONER OF CANADA
V. MINISTER OF ENVIRONMENT CANADA AND ETHYL CANADA INC.
INDEXED AS: CANADA (INFORMATION COMMISSIONER)
V. CANADA (MINISTER OF ENVIRONMENT)**

File No.: T-1125-99

Reference(s): [2001] F.C.J. No. 277 (QL) (F.C.T.D.)

Date of Decision: April 2, 2001

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

Section(s) of *ATIA/PA*: Ss. 2, 25, 42, 69(1) (a), (b), (e), (3)(b) *Access to Information Act (ATIA)*

Other statute(s): S. 39(1), (2)(a), (b), (e), (4)(b) *Canada Evidence Act (CEA)*

Abstract

- Refusal to release “discussion papers” on basis of s. 69(1)(a) and (e) *ATIA* (Cabinet confidences)
- Certificate issued under s. 39(2)(a) and (e) *CEA*
- Jurisdiction of Court under s. 42 *ATIA* to review whether record is Cabinet confidence and to review issuance of certificate issued under *CEA*
- History of Cabinet confidences
- Meaning of “discussion papers”
- Evolution of Cabinet Paper System
- Standard of judicial review

Issues

- (1) Does the Federal Court have jurisdiction under s. 42 *ATIA* to review the decision by PCO that the records at issue constitute Cabinet confidences pursuant to paras. 69(1)(a) and (e) of the *ATIA*?
- (2) Is the certificate of the Clerk of the PCO issued under paras. 39(2)(a) and (e) of the *Canada Evidence Act* subject to judicial review?
- (3) Did the PCO and the Minister of Environment err in their decision not to release the records on the basis of paras. 69(1)(a) and (e) *ATIA*?
- (4) Did the Clerk of the PCO err in issuing a certificate pursuant to paras. 39(2)(a) and (e) of the *CEA*?

Facts

The Information Commissioner filed an application, under para. 42(1)(a) of the *ATIA*, to review the decision of the Minister of Environment denying access to four documents which both the Minister and PCO determined to be Cabinet confidences pursuant to paras. 69(1)(a) and (e) of the *ATIA* and for which the Clerk of the PCO issued a certificate under paras. 39(2)(a) and (e) of the *Canada Evidence Act*.

Ethyl Canada Inc., which had made the original access request to the Minister of Environment for “Discussion Papers, the purpose of which is to present background explanations, analyses of problems or policy options to the Queen’s Privy Council for Canada for consideration by the Queen’s Privy Council for Canada in making decisions with respect to MMT” (a gasoline additive), filed a motion of appearance as a party.

Further to the Minister of Environment’s refusal, Ethyl complained to the Information Commissioner (IC). The IC concluded that Ethyl’s complaint was well founded, in light of the evolution of the Cabinet Paper System since the passage of the *Access to Information Act*.

Section 69 of the *ATIA* excludes Cabinet confidences from the operation of the Act. However, an exception is made for “discussion papers” in the case where the Cabinet’s decision has been made public (para. 69(3)(b)(i)) or in the case where four years have passed since the decision was taken (para. 69(3)(b)(ii)). A review of the evolution of the Cabinet Paper System indicates that when the *ATIA* was passed in 1982, the Cabinet Paper System produced two records: the Memorandum to Cabinet and the “discussion papers” containing background explanations, analyses of problems and policy options. In 1983, it was recommended that supporting background information and analysis be put in appendices to the MC, and that “discussion papers” be understood as papers prepared by government departments as part of a planned communication strategy. The recommendation was adopted by the PCO in 1984. The MC is now divided into two sections: the ministerial recommendations section and the analysis section. The analysis section now contains the background information and analysis found in “discussion papers” as understood when the *Access to Information Act* was passed in 1982.

Based on the evolution of the Cabinet Paper System, the IC recommended that the relevant information relating to background explanations, analyses of problems or policy options be severed pursuant to s. 25 of the *ATIA* from records which are Cabinet confidences, and disclosed pursuant to para. 69(3)(b) of the *ATIA*. The Minister of Environment did not follow the IC’s recommendation, hence this application for judicial review. On proceedings preparatory to the hearing of this application, the Clerk of the Privy Council issued a certificate under paras. 39(2)(a) and (e) of the *CEA* certifying that the four documents are Cabinet confidences, and objected to their disclosure.

Decision

The application for judicial review was allowed. The Court ordered that the four documents determined as Cabinet Confidences be returned for review by the Clerk of the Privy Council to determine whether they contain background explanations, analysis of problems or policy options that can be reasonably

severed from the documents pursuant to s. 25 of the *Access to Information Act* and if such information is deemed severable, that it be released to Ethyl Canada Inc.

Reasons

Issue 1

The purpose of the *ATIA* is to extend the right of access to government information. The interpretation which infringes the public's right to access the least is one which limits the exclusions in paras. 69(1)(a) to (g) as much as possible, and gives full effect to the exceptions to the exclusions in paras. 69(3)(a) and (b).

In order to give full effect to paras. 69(3)(a) and (b), the Court held that, although the *ATIA* does not apply to Cabinet confidences, it does apply to "discussion papers" as defined in para. 69(1)(b) of the *ATIA* if the provisions of subparas. 69(3)(b)(i) and (ii) apply. In reaching that conclusion, the Court looked at the history of Cabinet confidences which reveals that Parliament revoked subs. 41(2) of the *Federal Court Act* which provided for absolute confidentiality of all Cabinet confidences and chose to enact, in 1982, exceptions to the exclusions listed in paras. 69(1)(a) to (g) of the *ATIA* and paras. 39(2)(a) to (f) of the *CEA*. It also looked at the intention of Parliament and found that by enacting the exceptions in para. 69(3)(b) of the *Access to Information Act* and para. 39(4)(b) of the *Canada Evidence Act*, Parliament intended that information containing background explanations, analysis of problems or policy options be released to the public, in order to increase government accountability to the public.

The Court then examined the issue of who could decide whether or not records or information fall within one of the exceptions. It held that there was extrinsic evidence in the case at bar which it could not ignore. The Court found this evidence in the evolution of the history of the Cabinet Paper System since

1982. The Court's view is that a review of that system points towards the possible existence of information relating to background explanations, analysis of problems or policy options as described in para. 69(1)(b) that are still found in the current Cabinet documents, under the "analysis" section of the Memorandum to Cabinet. Paragraph 69(3)(b) states that subs. 69(1) does not apply to discussion papers described in para. 69(1)(b). Therefore, discussion papers as understood in para. 69(3)(b) are not excluded from the operation of the *Access to Information Act* pursuant to subs. 69(1). Given the application of the *ATIA*, the Court found authority under s. 42 to judicially review the decisions of the PCO to withhold the documents at issue in their entirety.

Issue 2

The Court reviewed a number of leading cases dealing with whether a court can judicially review the issuance of a certificate pursuant to s. 39 of the *Canada Evidence Act*.

The Court applied the comment made in *Canadian Association of Regulated Importers v. Canada*, [1991] F.C.J. No. 1306 (QL) (F.C.T.D.) to the effect that the existence of clear extrinsic evidence may be used to judicially review the issuance of a certificate. The extrinsic evidence in the case at bar is clear. There is no dispute that the information in "discussion papers" is now included in the "analysis" section of the Memorandum to Cabinet. There is also no dispute that officials at the PCO understand "discussion papers" are now to be papers prepared as part of a planned communications strategy and no longer included in a Memorandum to Cabinet.

The Court ruled that although it does not have jurisdiction to review the four documents at issue, the Court must have jurisdiction, however, to review the decision of PCO to withhold information which may fall within the exception provided for in para. 69(3)(b) of the *Access Act* and para. 39(4)(b) of the *Canada Evidence Act*.

The Court held that the proper standard of review to apply is correctness. It based its decision on the fact that the question to be determined in this case – the proper meaning of “discussion papers” – is a question of law and on the purpose of the *ATIA* – to provide the public with greater access to government documents.

Issue 3

Having determined the applicable standard of review, the Court proceeded to determine if the PCO had erred in its decision that the documents at issue fall within paras. 69(1)(a) and (e) of the *Access to Information Act*.

The Court reviewed the history of the meaning of “discussion papers”. It held that “transforming the ‘discussion papers’ into the ‘analysis’ section of the current Memorandum to Cabinet effectively limits access to background explanation, analysis of problems or policy options provided for in the Access Act” and concluded that such a change to the Cabinet Paper System could be viewed as an attempt to circumvent the will of Parliament.

The Court also concluded that the Deputy Clerk had erred in applying the “primary purpose” test when considering whether a document is a Cabinet confidence and in interpreting “discussion papers” as documents prepared as part of a planned communications strategy. It also noted that there is no mention of a “planned communications strategy” in the *ATIA* and that the meaning attributed to it by the PCO is not consistent with the purposes of the *ATIA*.

The correct meaning of “discussion papers” intended in paras. 69(1)(b) and 69(3)(b) of the *ATIA* is information the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions. If this information exists but is included in the MC, the next step is to determine whether this information can be reasonably severed from the MC pursuant to s. 25 *ATIA*.

Having determined the standard of review to be correctness, the Court ruled that the PCO must re-examine the documents to determine whether they contain information described in para. 69(1)(b) and if so, determine if this information can be reasonably severed pursuant to s. 25 of the Act. Given that Cabinet's decision concerning MMT was made public when it introduced Bill C-94 in 1996, by operation of law the information in question falls within the exception of para. 69(3)(b) of the *Access to Information Act*.

Issue 4

The Court held that given that para. 69(3)(b) of the *Access to Information Act* and para. 39(4)(b) of the *Canada Evidence Act* are almost identical, the same reasoning and logic applies to the issuance of a certificate by the Clerk of the PCO.

No provision for the severance of this information is required under the *CEA*. Subsection 39(1) of the *CEA*, unlike subs. 69(1) of the *ATIA*, refers to "information". By using the word "information", Parliament intended that information which is considered background explanations, analyses of problems or policy options be disclosed. Disclosure is required, since the information is no longer considered a "Queen's confidence" by application of subpara. 39(4)(b)(i) of the *CEA*.

The Court found that the Clerk made a reviewable error by not applying the above test, that is, by not considering whether the "information in" the documents is within the exception in para. 39(4)(b) of the *Canada Evidence Act*. For these reasons, the Court ruled that the certificate be sent back to the Clerk for reconsideration.

Comments

The Crown commenced an appeal to the Federal Court of Appeal against the Trial Division decision. The Trial Division order was stayed pending the appeal.

**MATTHEW G. YEAGER V. CORRECTIONAL SERVICE OF CANADA
AND COMMISSIONER OF CORRECTIONS
INDEXED AS: YEAGER V. CANADA (CORRECTIONAL SERVICE)**

File No.:	T-549-98
References:	[2001] F.C.J. No. 434 (QL) (F.C.T.D.)
Date of Decision:	May 3, 2001
Before:	Simpson J. (F.C.T.D.)
Section(s) of <i>ATIA/PA</i> :	Ss. 3 and 4(3) <i>Access to Information Act (ATIA)</i> ; s. 3 <i>Access to Information Regulations</i>
Other statute(s):	S. 2(b) <i>Canadian Charter of Rights and Freedoms</i> (<i>the Charter</i>)

Abstract

- Duty to produce machine readable records
- Whether software is a “record”
- Constitutional “right of access” with respect to all information in the possession of government under s. 2(b) of the *Charter*

Issues

- (1) Whether the creation of the “Requested Data” and the “Code Book” would unreasonably interfere with the operations of the respondent pursuant to subs. 4(3) of the *ATIA* and s. 3 of the *Regulations*?
- (2) Whether software constitutes a record as defined under s. 3 of the *ATIA*?
- (3) Whether para. 2(b) of the *Charter* guarantees a constitutional “right to know” with respect to all information in the possession of government?

Facts

This is an application for judicial review of the respondents' decision to deny the applicant's requests for access to information. The applicant also sought a declaration that the respondents' decision contravened his constitutional rights pursuant to para. 2(b) of the *Charter*.

The applicant requested the following records for use on his personal computer:

- (a) the 1992-93 CSC release cohort currently being used to recalibrate the GSIR (General Statistical Indicator of Recidivism) with personal identifiers deleted (hereinafter referred to as the "Requested Data");
- (b) the Code Book used to define and identify/locate the variables in each case (hereinafter referred to as the "Code Book");
- (c) a copy of the Offender Intake Assessment software, which included the: Custody Rating Scale (CRS), the GSIR, and the Community Risk/Needs Management Scale, among other features, described collectively as the "Software".

The respondents conceded that the "Requested Data" could be created and the only issue was whether its creation would unreasonably interfere with its operations as described in s. 3 of the *Access to Information Regulations*. The respondents submitted evidence that the creation, purging and packaging of the record would take approximately two weeks of work with dedicated computers. The respondents' position in regards to the "Code Book" was that they were not normally produced because the respondents have the expertise to read the data without them and their creation is a very labour intensive activity. Finally, in regards to the software, the respondents argued that these programs do not exist as independent software programs for use on personal computers but rather are integrated into software designed for the respondents' mainframe computer and are not available as separate stand

alone software packages. Further to the respondents' refusal, the applicant complained to the Information Commissioner (IC). The IC agreed with the respondents' decision denying access to the requested records.

Decision

The application for judicial review was allowed in part. The Court ordered that the respondents create and provide the applicant with the "Requested Data" and the "Code Book". No order was made with respect to the "Software" as the Court held that software was not a record. The Court did not grant the declaratory relief sought by the applicant pursuant to para. 2(b) of the *Charter*.

Reasons

Issue 1

The Court held that the respondents failed to demonstrate that creating the records would unreasonably interfere with their operations. The evidence that the creation, purging and packaging of the "Requested Data" would take approximately two weeks of work with dedicated computers was judged insufficient. The Court indicated there should be clear evidence about the impact of the request on the respondents' operations such as evidence about the capacity of the computer system to respond to the request, how many staff members would be needed, the workload of the institution and how much time would be required to do the work.

In regards to the "Code Book" the Court disagreed with the respondents' position that subs. 4(3) of the Act does not apply because the institution did not normally produce the record. The Court felt the relevant question was whether the record was capable of being produced using the computers, software and expertise normally used by the institution. In this case the Court held that the evidence indicated it was possible to create the "Code Book" and there was no evidence to the effect that creating them would unreasonably interfere with the respondents' operations.

Issue 2

The Court held that software was not a record for purposes of the Act. Simpson J. referred to the definition of “record” in s. 3 of the Act and noted in particular that none of the items listed in the definition are those used to generate, view or edit the information. She noted, as examples, that the definition of record includes a photograph but not the camera used to create the photograph. It includes a film but not the machine used to view the film. Similarly, software serves to create and read a disk and manipulate information on the disk. It is the data and the disk that constitute the record, not the software. Even if the software were a record, she held it would not be producible under subs. 4(3) of the Act because the software requested did not exist in a stand alone format but rather was part of an integrated whole which could not be used on a personal computer.

Issue 3

In regards to the declaration sought by the applicant that para. 2(b) guarantees a constitutional “right to know” with respect to all information in the possession of government, the Court agreed with the respondents’ argument that such a declaration would effectively mean that access to information was a constitutionally protected right. The Court cited with approval the Ontario Divisional Court decision in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 at 230-204, where, on a similar issue, the Divisional Court concluded that: “[...] the profound difficulty, represented by the statutory title “*Freedom of Information and Protection of Privacy Act*” is equating responsible or accountable government with transparency governance. Indeed, this may explain why there is no unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts. By contrast, our political access makes government bureaucracy accountable to elected officials, who in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. [...] Against this tradition, it is not possible to proclaim that s. 2(b) entails a

general constitutional right of access to all information under the control of government [...]”.

The Court agreed with that decision and denied the declaratory relief sought by the applicant.

Comments

The Correctional Service of Canada and the Commissioner of Corrections have appealed this decision.

**RUBIN V. MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE
INDEXED AS: RUBIN V. CANADA (MINISTER OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE)**

File No.:	T-2304-98
References:	[2001] F.C.J. No. 698 (QL) (F.C.T.D.)
Date of Decision:	May 7, 2001
Before:	Blanchard J. (F.C.T.D.)
Section(s) of <i>ATIA/PA</i> :	Ss. 2, 4, 41, 49 <i>Access to Information Act (ATIA)</i>
Other statute(s):	<i>National Archives of Canada Act</i>

Abstract

- Jurisdiction of Court to issue instructions to Department respecting late release of record
- Issue of control
- Record not in physical possession of Department at time of request

Issues

- (1) Does the Court have jurisdiction to issue instructions to DFAIT with respect to the late release of the “Survey Report”?
- (2) Should the Court find the “Shangai Report” to be under the control of DFAIT?

Facts

As a result of his request for access to records relating to the sale of Candu reactors to China, the applicant was provided with copies of three records, but was refused access to a draft report on the survey of studies conducted by

Atomic Energy of Canada Limited (the “Survey Report”) and to the report prepared by the Shanghai Nuclear Energy Research Institute (the “Shanghai Report”).

The Survey Report, which was initially withheld on the basis of para. 13(1)(a) and s. 20 *ATIA*, was released to the applicant one year after the filing of this application for judicial review, on the ground that the Chinese government no longer opposed its release.

The affidavit put forward by DFAIT indicates that the Shanghai Report had been used by DFAIT over a limited period of time but had been returned by the latter to AECL prior to the applicant’s request for access. The Shanghai Report had been provided directly to AECL by the Chinese government, in confidence and on the condition that it not be disclosed to the public.

The applicant argues, on this application for judicial review under s. 41 *ATIA* (1) that the Court has jurisdiction to issue instructions to DFAIT concerning the late release of the Survey Report and (2) that the Shanghai Report was under the control of DFAIT at the time of his request for access. More specifically, the applicant argues that since the Shanghai Report was used by DFAIT in its operations, it should be found to be under its control. He also argues that DFAIT should have filed that Report with the National Archives pursuant to the *National Archives of Canada Act (NAA)*.

Decision

The application for judicial review was dismissed.

Reasons

Question 1

It is not the role of this Court to issue instructions to DFAIT where there is no continuing refusal to disclose the records at issue, in this case the Survey Report. Both ss. 41 and 49 *ATIA* require, as a condition precedent, that the government institution refuse to disclose the record at issue. This is consistent with the purpose of the *ATIA*, as stated in s. 2, which is to provide the public with a right of access to information in the records of government institutions. Once this right has been provided, there is no further remedy for this Court to order.

Question 2

The issue of whether or not a record is under the control of a government institution must be determined on a case by case basis, and not limited by a test as to how information must be used. The evidence before the Court indicated that all copies of the Shangai Report were returned to AECL and that the search conducted by DFAIT was done in accordance with the *ATIA*. There was no evidence that the Report was returned for an ill-motivated purpose nor that DFAIT contracted out of the *ATIA*. Given that evidence, the Court was satisfied that DFAIT did not have control of the Report at the time the applicant's request for access was filed.

Although the Court did not condone the actions of DFAIT in its failure to comply with the *National Archives of Canada Act*, it found that this failure had no bearing on the present proceedings which were filed under s. 41 *ATIA*. It held that the purpose of the *NAA* is fundamentally different from the purpose of the *ATIA*, and that an application under the *ATIA* must be determined in light of the purpose and provisions of the *ATIA* alone.

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

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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)
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Canada Site

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