



Government
of Canada

Gouvernement
du Canada

Info Source

Privacy Act
and
*Access to
Information Act*

Bulletin Number 30
December 2007

Canada

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A. Introduction

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

Info Source: Access to Information Act and Privacy Act Bulletin

This annually updated *Info Source Bulletin* contains Statistical Tables reflecting the number of Access to Information and Privacy requests by institutions within the federal government on an annual basis and cumulative statistics since 1983. It also contains summaries of 2006-2007 federal court cases related to the *Access to Information Act* and the *Privacy Act*.

B. Information on the Government of Canada

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

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

Canada Business Service Centres provide bilingual, toll-free information related to business, starting a business or programs, services or regulations related to business. These Centres are able to answer both federal and provincial questions.

Toll-free 1-888-576-4444
Web Site www.cbsc.org

Canada Web Site

Web Site www.canada.gc.ca

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

C. About *Info Source*

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

There are four *Info Source* publications:

Info Source: Sources of Federal Government Information:

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

Info Source: Sources of Federal Employee Information:

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

Info Source: Directory of Federal Government Enquiry Points:

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

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

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

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

D. Roles and Responsibilities

Treasury Board Secretariat

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

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

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

Individual Institutions

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

E. Additional Information

Statistical Information – Personal Information Banks 2006-2007

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

Treasury Board of Canada Secretariat

L'Esplanade Laurier, 8th Floor, East Tower
140 O'Connor Street
Ottawa, Ontario K1A 0R5

General Enquiries	613-957-2400
Publications.....	613-995-2855
Facsimile.....	613-996-0518
TTY	613-957-9090
General Library Reference.....	613-996-5494
E-Mail.....	infosource@tbs-sct.gc.ca
Internet.....	www.tbs-sct.gc.ca

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

Treasury Board Distribution Centre

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

Telephone	613-995-2855
Facsimile.....	613-996-0518
E-Mail.....	Services-Distribution@tbs-sct.gc.ca

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

Publishing and Depository Services

Public Works and Government Services Canada

Ottawa, Ontario K1A 0S5

E-Mail publications@pwgsc.gc.ca
Telephone 613-941-5995
Telephone Toll free (Canada & US) 1-800-635-7943
Facsimile 613-954-5779
Facsimile Toll free (Canada & US) 1-800-565-7757
Web Site <http://publications.gc.ca>

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

**STATISTICAL
INFORMATION –
PERSONAL
INFORMATION BANKS
2006–2007**

Personal Information Banks

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

Number of institutions registering new PIBs during this period	35
Number of new PIBs registered during this reporting period	196
Number of new institution-specific PIBs registered	12
Number of new Standard PIBs registered	184

**STATISTICAL
TABLES
2006–2007
ACCESS TO INFORMATION**

Access to Information Requests April 1, 2006 to March 31, 2007

These figures are based on Statistical Reports provided by 154 of the 165 federal institutions subject to the *Access to Information Act*. Eleven institutions, Belledune Port Authority, Gwich'in Land Use Planning Board, Halifax Port Authority, International Centre for Human Rights and Democratic Development, Mackenzie Valley Environmental Impact Review Board, Marine Atlantic Inc, Parc Downsview Park Inc., Quebec Port Authority, Ridley Terminals Inc., Saguenay Port Authority, Sept-Îles Port Authority did not submit Statistical Reports.

Requests received during this reporting period	29,182
Requests brought forward from previous reporting period	6,066
Total number of requests	35,248
Requests completed	29,473
Requests carried forward to next reporting period	5,775

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

Disposition of completed requests

Requests where all information was disclosed	23.1%	6,808
Requests where information was disclosed in part	49.7%	14,650
Requests where all information was excluded	0.5%	151
Requests where all information was exempted	1.3%	395
Requests transferred to another institution	1.9%	559
Requests where information was given informally	0.6%	166
Requests which could not be processed (by reasons such as insufficient information provided by applicant, no records exist or abandonment by applicant)	22.9%	6,744
Total		29,473

Source of Requests

Requests received from businesses	44.1%	12,868
Requests received from the public	32.4%	9,461
Requests received from the media	12.4%	3,617
Requests received from organizations	10.0%	2,932
Requests received from academics	1.0%	304
Total Requests Received		29,182

Institutions ranked in order of number of requests received

1)	Citizenship and Immigration Canada	35.9%	10,497
2)	National Defence	6.2%	1,808
3)	Canada Revenue Agency	5.5%	1,604
4)	Health Canada	4.9%	1,442
5)	Transport Canada	4.5%	1,298
6)	Canada Border Services Agency	3.2%	945
7)	Royal Canadian Mounted Police	3.1%	911
8)	Public Works and Government Services Canada	3.0%	869
9)	Environment Canada	2.9%	851
10)	Library and Archives Canada	2.6%	744
11)	Other Departments	28.1%	8,213
Total			29,182

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

0 to 30 days	57.8%	17,028
31 to 60 days	16.9%	4,983
61 to 120 days	12.1%	3,557
121 days or over	13.2%	3,905
Total		29,473

Extension Time Required

	30 days or less	31 days or over
Searching	1,499	1,831
Consultation	1,350	2,320
Third Party	101	1,627

Exemptions

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

Section 19	Personal information	30.2%	10,755
Section 21	Operations of government	14.9%	5,297
Section 15	International affairs and defence	14.5%	5,158
Section 20	Third party information	12.3%	4,374
Section 16	Law enforcement and investigations	11.7%	4,160
Section 13	Information obtained in confidence	4.4%	1,582
Section 23	Solicitor-client privilege	3.9%	1,398
Section 24	Statutory prohibitions	2.8%	1,009
Section 14	Federal-provincial affairs	2.6%	921
Section 18	Economic interests of Canada	1.8%	657
Section 22	Testing procedures	0.5%	171
Section 26	Information to be published	0.3%	97
Section 17	Safety of Individuals	0.2%	79
Total			35,658

Exclusions

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

Section 69(1)(g)	35.4%	808
Section 69(1)(a)	21.7%	495
Section 69(1)(e)	18.5%	422
Section 68(a)	9.4%	214
Section 69(1)	5.5%	125
Section 69(1)(d)	4.1%	94
Section 69(1)(c)	3.5%	79
Section 69(1)(f)	1.5%	34
Section 69(1)(b)	0.3%	6
Section 68(b)	0.3%	6
Section 68(c)	0.1%	2
Total		2,285

Costs and Fees for Operations

Requests completed	29,473
Cost of operations	\$33,947,814.57
Cost per completed request	\$1,151.83
Fees collected	\$296,826.71
Fees collected per completed request	\$10.07
Fees waived	\$202,365.19
Fees waived per completed request	\$6.87

**STATISTICAL
TABLES
2006-2007
PRIVACY**

Privacy Requests – April 1, 2006 to March 31, 2007

These figures are based on Statistical Reports provided by 161 of the 172 federal institutions subject to the *Privacy Act*. Eleven institutions, Belledune Port Authority, Gwich'in Land Use Planning Board, Halifax Port Authority, International Centre for Human Rights and Democratic Development, Mackenzie Valley Environmental Impact Review Board, Marine Atlantic Inc, Parc Downsview Park Inc., Quebec Port Authority, Ridley Terminals Inc., Saguenay Port Authority, Sept-Îles Port Authority did not submit Statistical Reports.

Requests received during this reporting period	34,559
Requests brought forward from previous reporting period	8,391
Total number of requests	42,950
Requests completed	35,262
Requests carried forward to next reporting period	7,685

Disposition of completed requests

Requests where all information was disclosed	34.3%	12,095
Requests where information was disclosed in part	46.1%	16,254
Requests where all information was excluded	0.1%	27
Requests where all information was exempted	1.1%	383
Requests unable to be processed (Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)	18.4%	6,503
Total		35,262

Institutions ranked in order of number of requests received

1) Human Resources and Skills Development Canada	24.0%	8,542
2) Correctional Service Canada	21.0%	7,531
3) Citizenship and Immigration Canada	14.0%	4,809
4) National Defence	13.0%	4,620
5) Royal Canadian Mounted Police	6.0%	1,969
6) Other Departments	22.0%	7,791
Total		35,262

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	66.3%	23,378
31 to 60 days	15.9%	5,590
61 to 120 days	7.5%	2,653
121 days or more	10.3%	3,644
Total		35,262

Exemptions

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

Section 26	Information about another individual	59.5%	14,146
Section 22	Law enforcement and investigation	20.3%	4,819
Section 19	Personal information obtained in confidence	7.5%	1,795
Section 21	International Affairs and defence	6.6%	1,571
Section 24	Individuals sentenced for an offence	3.1%	738
Section 27	Solicitor-client privilege	2.3%	547
Section 25	Safety of individuals	0.3%	65
Section 28	Medical records	0.2%	36
Section 23	Security clearances	0.1%	30
Section 18	Exempt banks	0.1%	17
Section 20	Federal-provincial affairs	0.0%	7
Total			23,771

Exclusions

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

Section 70(1)(a)	53.8%	7
Section 69(1)(a)	23.1%	3
Section 70(1)(c)	15.4%	2
Section 70(1)(e)	7.7%	1
Section 69(1)(b)	0.0%	0
Section 70(1)(b)	0.0%	0
Section 70(1)(d)	0.0%	0
Section 70(1)(f)	0.0%	0
Total		13

Costs for Operations

Requests completed	35,262
Cost of operations	\$18,348,799.90
Cost per request completed	\$520.36

Privacy Impact Assessments (PIA)

Number of Privacy Impact Assessments (PIA) initiated	62
Number of Preliminary Privacy Impact Assessments (PPIA) initiated	44
Number of PIAs forwarded to the Office of the Privacy Commissioner (OPC)	17
Number of PPIAs forwarded to the Office of the Privacy Commissioner (OPC)	3
Number of PIA summaries posted on institutional web sites	9

**STATISTICAL
TABLES
1983-2007
ACCESS TO INFORMATION**

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

Disposition of Requests

Requests received	333,065
Requests completed	326,641

Disposition of completed Requests

Requests where all information was disclosed	31.8%	104,012
Requests where information was disclosed in part	39.5%	128,968
Requests where all information was excluded	0.6%	1,890
Requests where all information was exempted	2.7%	8,973
Requests transferred to another institution	1.9%	6,052
Requests where information was given informally	3.2%	10,331
Requests which could not be processed (Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)	19.3%	63,093
Total		326,644

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	59.9%	195,719
31 to 60 days	16.9%	55,254
61 days or more	21.0%	68,472
Total		326,641

Costs and Fees for Operations

Requests completed	326,641
Cost of operations	\$297,635,635.65
Cost per request completed	\$911.20
Fees collected	\$3,827,996.30
Fees collected per request completed	\$11.72
Fees waived	\$1,884,385.83
Fees waived per request completed	\$5.77

**STATISTICAL
TABLES
1983-2007
PRIVACY**

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

Disposition of Requests

Requests received	1,002,853
Requests completed	995,871

Disposition of Completed Requests

Requests where all information was disclosed	52.0%	517,603
Requests where information was disclosed in part	32.4%	322,802
Requests where all information was excluded	0.1%	536
Requests where all information was exempted	0.8%	8,010
Requests which could not be processed (by reasons such as insufficient information provided by applicant, no records exist and abandonment by applicant)	14.8%	146,920
Total		995,871

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	58.3%	580,803
31 to 60 days	18.5%	184,093
61 days or more	23.2%	230,978
Total		995,874

Costs for Operations

Requests completed	995,871
Cost of operations	\$223,323,057.35
Cost per completed request	\$224.25

FEDERAL COURT CASES

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

Index of Court Cases

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

Samir Elomari v. President of the Canadian Space Agency

Goodis v. Ontario (Ministry of Correctional Services)

Blank v. Canada (Minister of Justice)

Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)

Ahmadzadegan v. Canada (Minister of Public Safety and Emergency Preparedness)

Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)

Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)

Canada (Information Commissioner) v. Canada (Minister of Industry)

Blank v. Canada (Minister of Justice)

Janssen-Ortho Inc. v. Canada (Minister of Health)

SAMIR ELOMARI V. PRESIDENT OF THE CANADIAN SPACE AGENCY**INDEXED AS: SAMIR ELOMARI V. PRESIDENT OF THE CANADIAN SPACE AGENCY**

File No.: **T-1448-05**
Reference: **2006 CF 863**
Date of decision: **July 11, 2006**
Before: **Tremblay-Lamer J.**
Sections of *ATIA / PA*: **Ss. 3, 12, 21, 26, 27 and 41 *Privacy Act (PA)***

Abstract

- Judicial review under s.41 PA: Appropriate standard of review for sections 3 and 12 of the PA and appropriate standard of review for sections 26 and 27 of the PA.
- No evidence that the respondent acted in bad faith when exercising its discretion.

Issues

- (1) What is the appropriate standard of review when determining personal information within the meaning of sections 3 and 12 of the PA? Which is appropriate when determining whether a document is exempt under sections 26 and 27 of the PA?
- (2) Is the respondent's decision to refuse to disclose the information in question to the applicant under sections 12, 26 and 27 of the PA valid in this case?

Facts

The applicant filed a notice of judicial review under the provisions of section 41 of the PA for the purpose of challenging the President of the Canadian Space Agency's decision to deny him access to information under sections 12, 21, 26, and 27 of the PA. The applicant did not challenge the exemption under section 21 and the respondent admitted that section 27 does not apply to a paragraph in one of the protected documents.

These are the arguments raised by the applicant:

Further to a Superior Court of Québec decision allowing the applicant's action against the Canadian Space Agency in a case of illegal appropriation of an invention, it would be contrary to public order if the Canadian Space Agency could benefit from the exemptions granted under the PA.

Moreover, the applicant feels that the solicitor-client privilege under section 27 cannot be relied on to justify refusing to disclose documents when communications are made in order to facilitate the commission of a crime or fraud.

Decision

The application for judicial review is dismissed except for one paragraph in one of the documents, which must be disclosed to the applicant.

Reasons

Issue 1

The appropriate standard of review for determining personal information within the meaning of sections 3 and 12 of the PA is the standard of correctness: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66.

The appropriate standard of review of a decision by a federal board or tribunal that a document is subject to an exception (26 or 27 of the PA) is the standard of

correctness. If this decision is found to be valid, the discretionary decision by the federal board or tribunal to refuse disclosing a document should be reviewed under the reasonableness *Simpliciter* standard: *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147 (trial court), aff'd (1993), 154 N.R. 319 (F.C.A.); *Thurlow v. Canada (Solicitor General)*, 2003 FC 1414, [2003] F.C.J. No. 1802 (QL).

Issue 2

The court feels there is no doubt as to the validity of the respondent's finding that the information was not personal information under section 3.

The court confirms that nothing would allow it to conclude that the respondent acted in bad faith and it finds that the respondent appropriately exercised its discretionary power as set out under section 26 of the PA: *Mislan v. Canada (Minister of Revenue)*, [1998] F.C.J. No. 704 (trial court) (QL); *Keita v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 626, [2004] F.C.J. No. 782 (F.C.) (QL).

After reviewing the documents protected by the respondent under section 27 (solicitor-client privilege), the court is satisfied that they are covered by the exemption except for one paragraph in one document. moreover, the exercise of discretion by a federal board or tribunal to not disclose the documents is affirmed. there is not a single element of evidence that the discretionary power was exercised irregularly: *Stevens v. Canada (Prime Minister)*, [1998] 4 f.c. 89 (c.a.); *Gauthier v. Canada (Minister of Justice)*, 2004 fc 655, [2004] f.c.j. no. 794 (f.c.) (ql); *Canada v. Solosky*, [1980] 1 s.c.r. 821; *Descôteaux et al v. Mierzwinski*, [1982] 1 s.c.r. 860; *r v. Campbell*, [1999] 1 s.c.r. 565; *Samson Indian Nation and Band v. Canada*, [1995] 2 f.c. 762 (c.a.); *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 f.c. 268; *Blank v. Canada (Minister of Justice)*, 2004 fca 287, [2005] 1 f.c.j. 403 (f.c.a.); *Blank v. Canada (Minister of the Environment)*, 2001 fca 374, [2001] f.c.j. no. 1844 (c.a.) (ql).

**MINISTRY OF CORRECTIONAL SERVICES V. DAVID GOODIS, JANE DOE AND
ATTORNEY GENERAL OF CANADA**

INDEXED AS: GOODIS V. ONTARIO (MINISTRY OF CORRECTIONAL SERVICES)

File No.:	30820
Reference:	2006 SCC 31
Date of decision:	July 7, 2006
Before:	Rothstein J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron J.J. concurring)
Sections of <i>ATIA / PA</i> :	N/A (however, s. 23 of ATIA similar to s. 19 of <i>Freedom of Information and Protection of Privacy Act</i>)
Other Statutes:	<i>Freedom of Information and Protection of Privacy Act</i>, R.S.O., 1990, c. F-31, ss. 1(a), (b), 19, 52(2), (3), (5), (6), (8), (13), 54(2), 55; <i>Courts of Justice Act</i>, R.S.O. 1990, c. 43, ss. 135(2); <i>Judicial Review Procedures Act</i>, R.S.O. 1990, c. J.1, ss. 2910, 10.

Abstract

- Records subject to a claim of solicitor-client privilege may be ordered disclosed only in case of absolute necessity.
- The absolute necessity test is short to absolute prohibition and has been met in limited circumstances only. Disclosure of records to the requester's counsel for the purpose of facilitating arguments on the issue of whether the privilege is properly claimed does not meet the absolute necessity test.
- Disclosure of other records, not subject to a claim of solicitor-client privilege or judged as not privileged, should be subject to the discretion of the judge, with an objective to evaluate the appropriateness of confidentiality undertakings and ultimately to protect the confidentiality of those records until a substantive decision is made.

Issues

- (1) Can records subject to the claim of solicitor-client privilege by the ministry of correctional service be accessed by the requester's counsel for the purpose of arguing whether they should be disclosed under the Freedom of *Information and Protection of Privacy Act* (the "FIPPA")?
- (2) Is the divisional court of Ontario bound by the provision of the FIPPA?

Facts

This case concerns documents protected by section 19 of the FIPPA. The FIPPA is the privacy and access legislation of Ontario which provides a right of access to information under the control of the Ontario government and protects the privacy of individuals with respect to personal information held by the Ontario government. A request was made under the FIPPA for all records relating to allegations of sexual abuse of offenders by probation officers employed by the Ontario Ministry of Correctional Services (the "Ministry"). Although records were found by the Ministry, disclosure was refused on various grounds, one being solicitor-client privilege. The requester appealed the Ministry's decision to the Ontario Information and Privacy Commissioner, David Goodis, who ordered disclosure of the records. The Ministry moved to have the Commissioner's decision quashed by filing an application for judicial review in the Ontario Divisional Court. The documents were filed and sealed. Upon request, the judge ordered disclosure of the records to the requester's counsel, subject to a confidentiality undertaking. The decision was upheld by a panel of the Ontario Divisional Court and of the Ontario Court of Appeal which both found that the judge had jurisdiction to order disclosure of the records.

Decision

The appeal was allowed. The matter was remitted to the Divisional Court for re-determination in accordance with the reasons provided.

Reasons

Issue 1: Can records subject to the Ministry of Correctional Service's claim of solicitor-client privilege be accessed by the requester's counsel for the purpose of arguing whether they should be disclosed under the FIPPA?

Section 19 of the FIPPA protects from disclosure a record that is subject to solicitor-client privilege or that was prepared by or for the Crown counsel for use in giving legal advice (privilege communication between solicitor and client) or in contemplation of or use in litigation (i.e. litigation privilege). The decision dealt solely with the legal advice privilege (privilege communications between solicitor and client) and not with the litigation privilege. The SCC has already pronounced itself on the circumstances in which communications between solicitor and client may not be disclosed and has, in *Descôteaux*, laid down a substantive rule providing that a judge must not interfere with the confidentiality of communications between solicitor and client *except to the extent "absolutely necessary" in order to achieve the ends sought by the enabling legislation.*¹ The SCC's decision in *Lavallée* further emphasized the fundamental nature of the substantive rule.² As a result of these decisions, it became incumbent on a judge to apply the "absolute necessity" test when deciding an application for disclosure of records subject to solicitor-client privilege. More recently in *McClure*, the SCC declared that solicitor-client privilege had to be *as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by case basis.*³ While in *Fuda*, the Divisional Court proceeded in a balancing of interests on a case-by case basis, the SCC's jurisprudence is categorical that such fact-specific balancing should not apply to

1 *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, Lamer J.

2 *Lavallée, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002, SCC 61 – a provision of the Criminal Code which authorized the seizure of documents from a law office was found unreasonable within the meaning of s. 8 of the Canadian Charter of Rights and Freedoms because it permitted the automatic loss of solicitor-client privilege.

3 *R. v. McClure*, [2001] 1 S.C.R. 445, p. 459.

records involving communications between solicitor and client.⁴ At issue before the Ontario Courts was also the argument of procedural fairness. The lower courts concluded that procedural fairness required disclosure of the records to the requester's counsel. The SCC disagreed with such conclusion. In *Pritchard*, the SCC pronounced itself on the issue and was of the view that privilege and procedural fairness can co-exist without being at the expense of each other.⁵

The SCC has held that the test of "absolute necessity" was restrictive, short of an absolute prohibition. This test has been met in limited circumstances only, exemplifying its restrictive nature. In *Solosky*, it was concluded that privilege communications such as mail received by an inmate could be inspected to maintain the safety and security of the penitentiary.⁶ In *McClure*, it was held that privilege documents could be disclosed where there was a genuine danger of wrongful conviction because the information was not available from other sources and the accused could not otherwise raise a reasonable doubt as to his guilt.⁷ The Court found that disclosure of records to the requester's counsel for the purpose of facilitating arguments on the issue of whether the privilege is properly claimed did not meet the absolute necessity test. Judges are familiar with the notion of privilege and well equipped to determine whether a record is privilege. In the view of the Court, no evidence was presented to show the "absolute necessity" of disclosing records to the requester's counsel in the specific circumstances of the case at bar. Furthermore, the potential increase in the workload of the reviewing judge was argued to justify disclosure of records to the requester's counsel. The SCC held that increase in judicial workload or other administrative considerations did not make disclosure to the requester's counsel "absolutely necessary" for the purpose of arguing the judicial review application. Thus, the SCC found no reason to justify the establishment of a new test for disclosure of records subject to a claim for solicitor-client privilege in an access

4 *Fuda v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.).

5 *Pritchard v. Ontario (Human rights Commission)*, [2004] 1 S.C.R. 809. At paragraph 31 Major J. stated: *Procedural fairness does not require the disclosure of a privileged legal opinion. Privilege and procedural fairness may co-exist without being at the expense of the other ... The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.*

6 *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 841.

7 *Supra*, note 3.

to information case and found that the Ontario Courts had erred in permitting disclosure of the documents in the case at bar. The Court reiterated that “absolute necessity” was the appropriate test to apply to disclosure of documents for which a claim of solicitor-client privilege is made and that the evidence did not show that the test had been met.

Issue 2: Is the divisional court bound by the provision of the FIPPA?

The SCC disagreed with the Ministry’s position that a court hearing a judicial review of the Commissioner’s decision was bound by the provisions of the FIPPA prohibiting the Commissioner from disclosing any records until a final decision is made. After a textual analysis of the procedural provisions applicable to the Commissioner under the FIPPA (more specifically ss. 52(3), (4), (5), (13), 54(2) and s. 55, but also ss 52(6), 52(8)), the SCC could not find that they were also binding on the court hearing a judicial review. The court is bound by its own legislation governing court’s procedures on judicial review, i.e. the *Courts of Justice Act* and the *Judicial Review Justice Act*, which provides power to the court to order the exclusion of the public from hearings or to order that documents filed before it be treated as confidential, sealed and not form part of the public record (it was done in the case at bar). While the SCC agreed with the Ministry’s submission that a court sitting on a judicial review cannot and does not have more substantive decision-making powers than the Commissioner who’s decision is being reviewed, it remains that the procedures of the court is governed by the provisions of the relevant statutes and rules applying to the court.

Considering that the procedural provisions of the FIPPA applicable to the Commissioner are not applicable to the court, the matter of disclosure is therefore left to the court’s discretion and the court must adopt a procedure that will protect the confidentiality of records until a substantive decision is made. In light of such consideration, the SCC held that the approach taken by the reviewing judge, i.e. to demand a confidentiality undertaking from the requester’s counsel would have been acceptable if the documents were not subject to solicitor-client privilege.

Therefore, the SCC concluded that disclosure to the requester's counsel of other records, found not subject to a claim of solicitor-client privilege or judged as not privileged, should, in an objective to protect the confidentiality until a substantive decision is made and in consideration of the appropriateness of confidentiality undertakings, be subject to the discretion of the judge.

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

File Nos.:	T-817-04
Reference:	2006 FC 841
Date of decision:	June 30, 2006
Before:	O'Keefe, J. (F.C.T.D.)
Sections of <i>ATIA / PA</i> :	Ss. 19(1), 21(1)(a) and (b), 23, 41 <i>Access to Information Act (ATIA)</i>

Abstract

- Principle of reasonable severance (section 25) is paramount and applies to solicitor-client privileged materials (section 23)
- Matters of fact that are reasonably severable are not privileged and cannot be exempted under section 23
- Laws requiring disclosure in other legal proceedings cannot narrow or broaden the scope of disclosure under the ATIA
- Pursuant to section 41 review applications, the Court can only review records that are before it

Issues

- (1) Did the Minister of Justice lawfully exercise discretion to refuse to release the records?
- (2) To what extent does section 25 of the ATIA (severance) apply to section 23 of the ATIA (solicitor-client privileged materials)?

Facts

This is an application under section 41 of the ATIA for a review of a decision by the Minister of Justice (the respondent) to refuse access to certain records or portions of records.

Sheldon Blank (the applicant) had commenced a civil action against the Crown for damages for alleged fraud, conspiracy, perjury and abuse of prosecutorial powers in relation to convictions against him that were eventually quashed, and further charges under the *Fisheries Act* that were eventually stayed. It is against this backdrop that the applicant made several access requests for government files. Blank was denied access to certain records pursuant to subsection 19(1) (personal information), paragraphs 21(1)(a) and (b) (advice or recommendations, consultations or deliberations) and section 23 (solicitor-client privilege) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (ATIA). He subsequently complained to the Information Commissioner. The Information Commissioner investigated and concluded that the information withheld under subsection 19(1) and paragraphs 21(1)(a) and (b) were in fact properly exempted. The Information Commissioner was not persuaded, however, that the information withheld under section 23 fell within the ambit of that exemption.

Decision

The application for judicial review was allowed in part.

The Court begins its analysis by setting out the standard of review applicable to *ATIA* cases. It states at paragraph 22 that “[i]n reviewing the refusal of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record falls within the exemption claimed (See: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 at paragraph 47). However, if the *ATIA* provides for discretion to be exercised by the government institution in refusing to disclose an exempted record, the exercise of that discretion is generally reviewable on a standard of reasonableness.”

Reasons

Issue 1: Were the exemptions pursuant to sections 19 and 21 of the ATIA properly applied?

The Court simply held that subsection 19(1) of the ATIA was a mandatory exemption and that a government institution shall refuse to disclose requested records that contain personal information as defined in section 3 of the *Privacy Act*. The Court was satisfied that section 19 in this case was correctly applied.

The Court held that paragraphs 21(1)(a) and (b) were discretionary and was satisfied that the requested records were in fact “advice or recommendations developed by or for a government institution or a minister of the Crown” or “an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown”. The Court was also satisfied that the respondent’s exercise of discretion in withholding this information was reasonable.

Issue 2: Reasonable Severance of Solicitor-Client Privileged Materials

The Court essentially adopted the views expressed by Justice Mosley in *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 wherein he states that “not all communications between a lawyer and client are privileged – only those ... where the client has sought legal advice” (legal advice privilege), as well as documents or materials created or obtained for the purpose of litigation (litigation privilege). The Court also relied on the following statements made by Mosley J.: “a privileged communication does not lose its privilege merely because it contains matters of fact which are not privileged. In this situation, the matters of fact can be severed from the privileged communication [...]”

The Court again cited with approval the reasoning of Mosley J. at paragraphs 30 and 31 of the 2005 *Blank* decision:

Where, as in this instance, a claim of solicitor-client privilege may conflict with the public's right to access information in the hands of the government, it is important to note that Parliament intended section 25 of the Act to be of paramount importance. In *Rubin v. Canada (Mortgage and Housing Corp.)* [1988] F.C.J. No. 610 (F.C.A) (QL) the Court of Appeal stated:

I think it significant to observe that **section 25 is a paramount section since the words "Notwithstanding any other provision of this Act" are employed.** In my view, this means that once the head of the government institution has determined, as in this case, that some of its records are exempt, the institutional head, or his delegate, is **required to consider whether any part of the material requested can reasonably be severed.** Section 25 uses the mandatory "shall" with respect to disclosure of such portion, thereby requiring the institutional head to enter into the severance exercise therein prescribed....[Emphasis added]

Given the paramount nature of section 25 it would seem at first impression that documents determined to be subject to the exemption provided by section 23 of the Act are to be severed in the same manner as any other document subject to severance. On this reading of the requirements of severance under s. 25, information which can stand alone, without compromising privilege, such as facts upon which the advice is based, must be accessible.

Issue 3 & 4: Effect of Disclosure Under Other Legal Proceedings / Court's Powers to Review Records

The Court rejected the applicant's argument that the *Stinchcombe* disclosure during the criminal proceedings were insufficient. Relying on *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374, the Court reiterated at paragraph 37 the well established principle that "laws requiring disclosure in other legal proceedings cannot narrow or broaden the scope of disclosure required by the *Access to Information Act*."

The applicant also asked the Court to examine and make available to him documents that, he claims, had at one time been attached to a severed document. Relying on *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, the Court recognized the scope of sections 46 and 41 of the ATIA, and the authority it has been granted to review documents that are in evidence before it, with the exception of course to Cabinet Confidences which are excluded by section 69. The Court rejected the applicant's request because, in this case, the attachments were not part of the record before the Court.

The Court ordered further severance based on section 25 of the ATIA to permit the applicant to access additional information.

Comment

The Attorney-General of Canada has filed a notice of appeal to the Federal Court of Appeal on July 1st 2006.

**INFORMATION COMMISSIONER OF CANADA V. EXECUTIVE DIRECTOR OF THE
CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY
BOARD AND NAV CAN AND THE ATTORNEY GENERAL OF CANADA**

**INDEXED AS: CANADA (INFORMATION COMMISSIONER) V. CANADA
(TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD)**

File Nos.: **A-165-05, A-304-05**
Reference: **2006 FCA 157**
Date of decision: **May 1, 2006**
Before: **Richards C.J., Desjardins and Evans JJ.A.**
Sections of *ATIA / PA*: **Richards C.J., Desjardins and Evans JJ.A.**
Other statutes: ***Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 2; Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3, ss. 2, 7, 28, 29(1)(a), 29(6); Radiocommunication Regulations, SOR/96-484, s. 6***

Abstract

- Recordings and transcripts of air traffic control communications between air crew and air traffic controllers not “personal information” within meaning of s. 19(1) ATIA and s. 3 PA
- Air traffic control communications not falling within s. 20(1)(b) ATIA exemption

Issues

- (1) Are the ATC communications “personal information” so as to be exempt from disclosure under subs. 19(1) ATIA?
- (2) In the alternative, whether the disclosure of ATC communications is prohibited under para. 20(1)(b) ATIA?

Facts

This is an appeal from the decision of the Federal Court ([2006] 1 F.C.R. 605, 2005 FC 384, Snider J.) which dismissed applications for judicial review brought by the Information Commissioner pursuant to para. 42(1)(a) ATIA. The applications for judicial review relate to four refusals by the Canadian Transportation Accident Investigation and Safety Board (the Board) to disclose the recordings and transcripts of air traffic control communications (ATC communications) recorded by Nav Canada and under the control of the Board on the ground that they were exempt in their entirety under s.19 ATIA. The records at issue contain communications relating to four air occurrences.

Snider J. held that the ATC communications were “about” an individual. While recognizing that the content of the ATC communications was limited to the safety and navigation of the aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public, Snider J. found that the purpose of the ATC communications was “to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them”. Snider J. further held that the communications were about an “identifiable” individual since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of the specific controller. In addition, the voices of the individuals involved could be heard and identified. She determined that the information should not be disclosed because it was not “publicly available”, that paras. 8(2)(a) and (b) of the PA were not applicable, and that the Board had properly exercised its discretion under subpara. 8(2)(m)(i) PA when it refused to disclose the records sought.

Decision

The appeal was allowed.

Reasons

Issue 1

The FCA held that the ATC communications did not constitute “personal information” within the meaning of the opening words of the definition of personal information in s. 3 PA.⁸

In coming to that conclusion, the Court held that “personal information” must be understood as equivalent to information falling within an individual’s right to privacy. While a privacy-based interpretation of the definition of “personal information” does not provide a definite resolution to questions concerning the precise scope of “personal information”, the Court was of the view that such an interpretation of the definition of “personal information” captured the essence of the definition and was sufficient to dispose of the appeal at bar. The Court thus examined the concept of “privacy”, stating that it “connotes concepts of intimacy, identity, dignity and integrity of the individual”.

The FCA agreed with Snider J. that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. The ATC communications contain information about the status of the aircraft, weather conditions, matters associated with air traffic controls and the utterances of the pilots and controllers. However, the FCA held that this information was not “about” an individual since that information did “not match the concept of ‘privacy’ and the values that concept is meant to protect”. While the information may have the effect of leading to the identification of a person or may assist in determining how he or she has performed his/her task in a given situation, it did not qualify as “personal information”. It was information of a professional and non-personal nature, transmitted by an individual in job-related circumstances. Moreover, the possibility that the information may be used, in certain circumstances, as a basis for an evaluation of their authors’ performance, could not transform the

⁸ The opening words of the definition of “personal information” in s. 3 PA are as follows: “personal information” means information about an identifiable individual that is recorded in any form, including, without restricting the generality of the foregoing [...]”.

communications into “personal information” when the information contained therein has no personal content.

Issue 2

For para. 20(1)(b) ATIA to apply, the information must

- be financial, commercial, scientific or technical;
- be confidential
- be supplied to a government institution by a third party, and
- have been treated consistently in a confidential manner by the third party.

Information collected during an air flight is not “commercial” as that word is commonly understood. Neither is it correct to characterize the entire record collected during an air navigation flight as being “technical” information when only a specific part might be.

With respect to the second requirement, the Court held that Nav Canada failed to provide sufficient actual direct evidence of the confidential nature of the information at issue. First, Nav Canada’s evidence fails to elaborate, in relation to the information actually contained within the records at issue, as to how or why the information is objectively confidential. The fact that information may have been kept confidential in the past is at most only a factor to be considered in determining whether the information is confidential for the purposes of para. 20(1)(b). Second, the confidentiality provisions of the collective agreements between Nav Canada and the unions are not determinative of the status of the information for the purposes of the ATIA: private parties cannot contract out of the ATIA through such agreements. At most, such agreements may be taken into account to support other objective evidence of confidentiality. Third, Nav Canada has provided no supporting explanation as to how and why the maintenance of confidentiality serves the public interest. A bald assertion in this regard is insufficient.

Since the first two requirements of para. 20(1)(b) have not been met, the Court was of the view that it did not need to consider the other two requirements.

**SHAHROKH AHMADZADEGAN AND MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS****INDEXED AS: AHMADZADEGAN V. CANADA (MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

File Nos.:	T-1959-04
Reference:	2006 FC 523
Date of decision:	April 26, 2006
Before:	Blanchard J.
Sections of <i>ATIA / PA</i> :	Ss. 2, 12(1), 12(2), 22(1)(a), 26, 48 <i>Privacy Act (PA)</i>
Other statutes:	<i>S. 7 Canadian Charter of Rights and Freedoms</i>

Abstract

- Standard of review applicable to discretionary exemption in para. 22(1)(a) PA
- Refusal to disclose letter unreasonable under present circumstances
- Correlation between purpose of PA and right of correction under subs. 12(2) PA
- Court cannot order correction of personal information

Issues

- (1) Does the Court have jurisdiction to order the removal of allegedly false information on CSC's files and to order compensatory and special damages?
- (2) What is the appropriate standard of review with respect to para. 22(1)(a) of the PA?
- (3) Was the personal information properly exempted under para. 22(1)(a) of the PA?
- (4) If the information ought to have been disclosed to the applicant by the RCMP, can the Court order that his personal information held in the RCMP's files be corrected pursuant to subs. 12(2) of the PA?

Facts

This is a judicial review application pursuant to s. 41 of the PA of a decision by the RCMP to deny the applicant's request for access to his personal information.

The applicant alleges that because of “unfounded and unsubstantiated” allegations made by the RCMP to Correctional Service Canada (CSC) in a letter dated September 8, 1992, he was denied a transfer from a maximum security to a medium security institution as well as full parole. The applicant wrote letters to the RCMP and the CSC requesting that they provide him with the basis for their allegations and that they remove false allegations from his file, but did not receive any response. He subsequently submitted an access request to the RCMP pursuant to subs. 12(1) of the PA for information concerning the allegations made in the September 1992 letter and for any other factual information. In the letter accompanying the access request form, the applicant asked for details about his alleged involvement with the secret police in Iran, stating that he is entitled to have information corrected or have the author of the letter provide evidence of the allegations made against him. The RCMP denied his request for access on the basis of para. 22(1)(a) of the PA. The Privacy Commissioner determined that the applicant’s request was not well founded.

The applicant seeks, in his s. 41 application, an order from the Court directing the RCMP and CSC to remove all false information about him from their respective files as well as compensatory and special damages for loss of parole opportunities, for loss of opportunity to be classified at a lower security risk, and for mental and emotional distress. The applicant also alleges that the refusal to correct the information constituted a breach of his rights guaranteed under s. 7 of the *Charter*.

Decision

The application was allowed in part. The requested letter should be disclosed with specified portions redacted from it. The Court cannot order that personal information be corrected pursuant to subs. 12(2) of the PA.

Reasons

Issue 1: Does the Court have jurisdiction to order the removal of allegedly false information on CSC's files and to order compensatory and special damages?

The Court held that it did not have jurisdiction to order CSC to remove the allegedly false information from its files since what is at issue in this s. 41 application is the decision of the RCMP only. The Court also held that it was without jurisdiction to order the damages sought by the applicant on the ground that damages cannot be claimed by way of an application for judicial review: *Al-Mhamad v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 2003 FCA 45. Finally, the applicant adduced no evidence to support a finding that the RCMP's refusal to correct allegedly erroneous information in its files had violated the applicant's s. 7 *Charter* rights.

Issue 2: What is the appropriate standard of review with respect to para. 22(1)(a) PA?

The Court noted that since *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147 (F.C.T.D.), the caselaw had evolved and that the determination of the standard applicable to the decision of the RCMP not to disclose the personal information now requires a pragmatic and functional analysis. Relying on *Thurlow v. Canada (Solicitor General)*, 2003 FC 1414 which dealt with para. 22(1)(a) PA, the Court held that (a) with respect to the first type of decision—whether the requested information falls within the category of the exemption—the appropriate standard of review is correctness and (b) with respect to the second type of decision—whether the institution should nevertheless exercise its discretion to release—the standard is that of reasonableness *simpliciter*.

Issue 3: Was the personal information properly exempted under para. 22(1)(a) of the PA?

In order for the information to be properly exempted, they must meet the criteria under para. 22(1)(a) of the PA. That provision authorizes the head of a government institution, in exercising his or her discretion, to withhold personal information if:

- i. the information is less than 20 years old;
- ii. the information was obtained or prepared by an investigative body, as specified in the *Privacy Regulations*; and
- iii. the information was obtained or prepared in the course of a lawful investigation pertaining to, among other things, the detection, prevention or suppression of crime, or the enforcement of any law of Canada or a province.

Having established that the appropriate standard of review was correctness, the Court held that the RCMP's finding was correct with respect to all of the records withheld from the applicant.

However, the Court held that, given the circumstances of this case, the RCMP's decision to refuse disclosure of the September 1992 letter was unreasonable. The Court based its finding on the fact that the applicant already had a copy of the letter (which he had obtained by means other than his request under the PA) and that it could be inferred, from the records before the Court, that the RCMP knew that the applicant had a copy prior to making its decision to refuse disclosure. The Court added that the objective to be served by not disclosing the applicant's personal information—to protect the sources and nature of sensitive information obtained or prepared in the conduct of a criminal investigation--could no longer be met because the information was already in the applicant's hands. Furthermore, the Court was of the view that, given these particular circumstances, allowing the RCMP's decision to stand would be inconsistent with

the purpose of the PA which is not only to provide individuals with access to their personal information but also to protect the privacy of individuals with respect to their personal information. Implicit in this purpose is the right to ensure that one's personal information in records held by the government is accurate. Withholding the letter would deny the applicant the opportunity to have information he alleged to be erroneous, corrected pursuant to subs. 12(2) of the PA.

The Court ordered that the letter be disclosed to the applicant pursuant to subs. 12(1) PA with certain specified information redacted from it on the grounds of s. 26 PA.

Issue 4: If the information ought to have been disclosed to the applicant by the RCMP, can the Court order that his personal information held in the RCMP's files be corrected pursuant to subs. 12(2) of the PA?

The Court does not have jurisdiction on a s. 41 PA application for judicial review to order that personal information about the applicant be corrected pursuant to subs. 12(2). However, in ordering the disclosure of the letter pursuant to subs. 12(1), it was now open to the applicant to make a request for correction under subs. 12(2) of the PA. Subsection 12(2) can only be invoked with respect to information that has been released under subs. 12(1).

Comments

The RCMP has filed a notice of appeal.

**CANADIAN IMPERIAL BANK OF COMMERCE V. CHIEF COMMISSIONER,
CANADIAN HUMAN RIGHTS COMMISSION**

**INDEXED AS: CANADIAN IMPERIAL BANK OF COMMERCE V. CANADA
(CANADIAN HUMAN RIGHTS COMMISSION)**

File Nos.: **T-1941-04**

Reference: **2006 FC 443**

Date of decision: **April 24, 2006**

Before: **Blanchard J.**

Section of *ATIA* / *PA*: **Ss. 2(1), 4(1), 6, 16(1)(c), 16(4), 19, 20(1)(b),
20(1)(c), 24, 25, 44, 53 *Access to Information Act*
(*ATIA*); s. 3 *Privacy Act* (*PA*)**

Other statute: ***Employment Equity Act*, S.C. 1995, c. 44, ss. 5,
9(3), 18(1), 19, 22, 23(1), 34**

Abstract

- S. 44 *ATIA* application for judicial review against decision to release CHRC's final report on employment equity compliance
- Fact that request for final report not made in writing not nullifying decision of CHRC to release report and CHRC not *functus officio* when deciding to release report
- Final report "under the control" of CHRC
- No breach of procedural fairness
- Failure by CIBC to demonstrate that disclosure of final report could be injurious to future employment equity compliance review audits pursuant to para. 16(1)(c) *ATIA*
- Except for two passages, final report not exempt from disclosure under para. 20(1)(b) as not objectively confidential
- No evidence of reasonable expectation of probable harm pursuant to para. 20(1)(c) *ATIA*

- Final report not containing personal as information insufficient to reveal identity of individuals despite small number of individuals

Issue

- (1) Is the decision of the CHRC void because no written request was made for access to the Final Report and was the CHRC *functus officio* with respect to the Final Report?
- (2) Is the Final Report “under the control” of the CHRC and thus subject to the ATIA?
- (3) Did the CHRC breach procedural fairness by failing to provide the CIBC with a meaningful opportunity to participate in the proceeding?
- (4) Is information in the Final Report exempt from disclosure under para. 16(1)(c) of the ATIA?
- (5) Is information in the Final Report exempt from disclosure under para. 20(1)(b) of the ATIA?
- (6) Is information in the Final Report exempt from disclosure under para. 20(1)(c) of the ATIA?
- (7) Is information in the Final Report exempt from disclosure under s. 19 of the ATIA?
- (8) If any part of the Final Report is exempt, can the non-exempt information be reasonably severed and disclosed?

Facts

The Canadian Imperial Bank of Commerce (“CIBC”) was the subject of an employment equity compliance review audit conducted by the Canadian Human Rights Commission (“CHRC”) pursuant to the *Employment Equity Act* (the “EEA”).

Upon reception of a written request under the ATIA for the “Interim” CIBC Employment Equity Report, the CHRC informed the CIBC and provided the notice to third party in conformity with the ATIA. The CIBC opposed the release of the Interim Report on the grounds of the application of the statutory privilege of

s. 34 of the EEA and para. 20(1)(b) of the ATIA—confidential commercial information. Taking the representations made by the CIBC into consideration, the CHRC decided to withhold the Interim Report in its entirety on the basis of para. 20(1)(b) and informed the CIBC of this decision.

The written request for access was followed, some two years later, by a verbal request for access to the “Final” CIBC Employment Equity Report. The CHRC informed the CIBC and provided the notice to third party in conformity with the ATIA. The CIBC opposed the disclosure of the Final Report on the same grounds as those invoked for the Interim Report, and provided the CHRC with a copy highlighting the passages it considered exempt under para. 20(1)(b) of ATIA. The CHRC subsequently informed the CIBC of its intention to release the entire Final Report. Two days after that notice, the CHRC informed the CIBC that its decision not to release the Interim Report was based on para. 16(1)(c) of the ATIA, and not on para. 20(1)(b) of the ATIA as previously indicated.

The CIBC seeks judicial review, under s. 44 of the ATIA, of the decision of the CHRC to release the Final CIBC Employment Equity Compliance Report.

Decision

The application for judicial review was allowed in part only. The CHRC was entitled to receive costs in accordance with the *federal court rules*. Affidavits and other documents filed on a confidential basis were to remain sealed.

Reasons

Standard of Review

The Court applied the standard of correctness to review the CHRC’s decision to disclose the Final EEA Report of the CIBC.⁹ In light of the caselaw on s. 44 and taking into account subs. 2(1) of the ATIA, the Court conducted a hearing *de novo* and considered the new evidence raised by the parties with respect to para.

⁹ *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police*, [2003] 1 S.C.R. 66; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254.

20(1)(b). It also heard the additional grounds and evidence against disclosure raised by the third party in its s. 44 application, that is paras. 20(1)(c), 16(1)(c) and s. 19 ATIA.

Issue 1: Is the decision of the CHRC void because no written request was made for access to the Final Report and was the CHRC *functus officio* with respect to the Final Report?

The Court found that the decision was not void and that the CHRC was not *functus officio* when rendering its decision. That being said, the CHRC did not commit a reviewable error by accepting the second oral request as sufficient to engage its jurisdiction under the ATIA (noting, however, that it would have been desirable to have a second written request made for the Final Report). The requester's failure to comply strictly with s. 6 of the ATIA did not render the CHRC's decision void since the primary purpose of s. 6 of the ATIA is to ensure that a request for access is sufficiently detailed to allow the institution to readily identify the records. Accepting the oral request, in the circumstances, satisfied the spirit of the ATIA and, in any event, the deficiency would have been easily cured by the requester filing a written request. The Court was also of view that the CHRC was not *functus officio* in its decision to release the Final Report. The CHRC rendered two separate and distinct decisions, based on two separate and distinct requests.

Issue 2: Is the Final Report “under the control” of the CHRC and thus subject to the ATIA?

The Court concluded that the Final Report was under the control of the CHRC, who had jurisdiction to make a decision on a request for its access. The Court rejected the CIBC's argument that because the Final Report fell within the “statutory privilege” of s. 34¹⁰ of the EEA, it could not be disclosed without its written consent. In reaching its conclusion, the Court confirmed the broad and purposive approach adopted in the caselaw regarding the interpretation of the

10 Subsection 34(1) of the *EEA* reads as follows: “Information obtained by the Commission under this Act is privileged and shall not knowingly be, or be permitted to be, communicated, disclosed or made available without the written consent of the person from whom it was obtained.”

meaning of “under the control” and held that, in general, it was sufficient that the record be “in possession of the government”.

Issue 3: Did the CHRC breach procedural fairness by failing to provide the CIBC with a meaningful opportunity to participate in the proceeding?

The CHRC informed the CIBC, after its decision had been made to release the Final Report, that the previous decision to withhold the Interim Report was based on para. 16(1)(c) of the ATIA and not on para. 20(1)(b) ATIA. The CIBC argued that it was denied “sufficient information to permit meaningful participation” with respect to the Final Report (since it made essentially the same arguments as the ones made with respect to the Interim Report) and that, as a result, the CHRC had breached procedural fairness and that the decision to disclose the Final Report should be invalidated on that basis. The Court disagreed and found that the CIBC had been provided with a meaningful opportunity to participate in the proceeding through the notification process of ss. 27 and 28 of the ATIA. The CIBC could not rely on similarities between the Interim Report and the Final Report to make the same arguments for both since, in the opinion of the Court, both reports were quite different in substance. The Court noted that the CIBC did not suggest how its submissions would have been different if they had been made on the basis of para. 16(1)(c) rather than para. 20(1)(b) of the ATIA.

Issue 4: Is information in the Final Report exempt from disclosure under para. 16(1)(c) of the ATIA?

The Court concluded that in the treatment of the discretionary exemption under para. 16(1)(c) of the ATIA, two questions had to be considered. First, whether the Final Report fell within the ambit of para. 16(1)(c), and second, whether the head of the government institution properly exercised his/her discretion.

With respect to the first question, the Court found that the compliance review audit was a “lawful investigation” for the purposes of para. 16(1)(c) ATIA. The audit constituted an “investigation” within the meaning of subs. 16(4) as it pertained to the administration and enforcement of the EEA and was authorized

by subs. 23(1) of the EEA. Applying *Lavigne's* broad interpretation of “investigation”, it acknowledged an expansion of its scope to cover both ongoing and future investigations.¹¹

With respect to the second question, the Court, viewing the principles of *Lavigne* to be applicable, found that there needed to be a clear and direct connection between the disclosure of the specific information at issue and the injury alleged. The Court found that the CIBC had failed to establish a confident belief or a reasonable basis that the disclosure of the Final Report could be injurious to future employment equity compliance review audits. Therefore, there was no basis to exempt the Final Report under para. 16(1)(c) ATIA.

Issue 5: Is information in the Final Report exempt from disclosure under para. 20(1)(b) of the ATIA?

The Court found that, with the exception of two passages, the Final Report was not exempt from disclosure under para. 20(1)(b) of the ATIA.

- (1) Whether the information was commercial. The Court held that human resources information was “commercial” information. In the Court’s view, there is no single element more important than human resources for a commercial enterprise and its operations.
- (2) Whether the information was confidential. The three indicia of confidentiality are: first, whether the information is not publicly available—it was apparent here that much of the CIBC’s workforce data in the Final Report was already available to public, although presented differently; second, whether there is a reasonable expectation of non-disclosure--here the CIBC knew that any information provided to the CHRC was subject to the ATIA, therefore it was not reasonable for the CIBC to expect that such information would remain confidential pursuant to s. 34 of the EEA; and third, whether public benefit was fostered by maintaining confidentiality--here the Court believed that there was a public benefit in making transparent the performance of employers in meeting their statutory requirements under the EEA. Aside

11 *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

from two passages, the remainder of the information in the Final Report was found not to be objectively confidential.

- (3) Whether the information was supplied to the CHRC by the CIBC. The Court held that information clearly emanating from the third party satisfied that criteria. Such a narrow construction of the word “supplied” was consistent with the overriding purpose of the ATIA which is to make information under the control of a government institution accessible to the public.
- (4) Whether the information was treated consistently as confidential. Nothing in the CIBC’s undertaking of confidentiality vis-à-vis its employees nor in the evidence before the Court suggested that CIBC’s employees would have expected that the aggregate of their responses, once compiled, were to be kept confidential. Indeed, the aggregated workforce data were already publicly available through the annual workforce reports submitted to the Minister by the CIBC under the EEA.

The Court concluded that, with the exception of two passages, the public policy consideration underlying the purpose of the ATIA (i.e that government information should be available to the public) outweighed the evidence in support of the applicability of the para. 20(1)(b) exemption.

Issue 6: Is information in the Final Report exempt from disclosure under para. 20(1)(c) of the ATIA?

The Court concluded that the information in the Final Report was not exempt from disclosure under para. 20(1)(c) of the ATIA because the CIBC had not satisfied the requirements of the mandatory exemption. In the opinion of the Court, the CIBC did not show that there was any link between the disclosure of the information in the Final Report and probability of harm should disclosure occur. The Court found the evidence presented to be insufficient, only speculative assertions.

Issue 7: Is information in the Final Report exempt from disclosure under s. 19 of the ATIA?

While “personal opinions” may qualify as “personal information” under s. 3 of the *Privacy Act*, the opinions at issue could not be linked nor attributed to any specific individual. They represented a collective opinion of a group of visible minority senior managers who had self-identified for the purposes of the audit. The Final Report reveals neither the number of visible minority senior managers interviewed for the “opinions” nor the total number of visible minority senior managers in the employ of the CIBC. The Court held that the information was insufficient to reveal the identity of the speakers even if the total number of visible minority senior managers working at the CIBC at the time was small.

The Court held the same view with respect to certain data which listed the number of persons from each designated group in the different occupational groups of the CIBC. To extrapolate the identity of any specific employee from the data would require additional information about the CIBC’s employees which is not contained in the Final Report.

This was not a case where information about a small group constituted personal information. As a result, the Court found that the Final Report did not contain any personal information exempted under s. 19 of the ATIA.

Issue 8: If any part of the Final Report is exempt, can the non-exempt information be reasonably severed and disclosed?

The Court found that the two passages of the Final Report that could be exempted from disclosure could easily be severed from the non-exempted information, pursuant to s. 25 of ATIA. The Final Report could therefore be disclosed in its entirety, with the exception of the two passages.

Comments

The CIBC is appealing the decision.

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

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

File No.:	SCC 30417
Reference:	2006 SCC 13
Date of decision:	April 21, 2006
Before:	Deschamps J. (Binnie, Fish and Abella JJ. concurring) (Majority) Bastarache J. (McLachlin C.J. and LeBel J. concurring) (Dissent)
Sections of <i>ATIA / PA</i> :	Ss. 2, 3, 19, 20(1), 27, 28, 29, 44, 51 <i>Access to Information Act</i> (ATIA); ss. 3, 8(1), 8(2), 8(5) <i>Privacy Act</i> (PA); s. 18.1 <i>Federal Courts Act</i>

Abstract

- Third party can raise s. 19 ATIA exemption on a s. 44 ATIA application
- S. 44 must be interpreted in light of both *ATIA* and *Privacy Act*
- In a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation

Issues

Can a third party raise the s. 19 ATIA exemption on a s. 44 ATIA application?

Facts

In June 2000, the Canadian Food Inspection Agency (“CFIA”) received a request under the ATIA for access to certain records pertaining to Heinz. As CFIA determined that some of the records contained third party information that could be exemptable under subs. 20(1) ATIA, notice was given to Heinz pursuant to ss.

27 and 28 ATIA seeking Heinz's representations as to why the documents should not be disclosed. After reviewing Heinz's submissions, CFIA decided to disclose the records, subject to certain redactions, and notified Heinz thereof. On September 27, 2000, Heinz filed a s. 44 ATIA application, arguing that the records in question should not be disclosed because they were caught by subs. 20(1) and subs. 19(1) ATIA. Heinz was raising s. 19 in order to protect the personal information of several of its employees.

The Attorney General argued before Layden-Stevenson J. ([2003] 4 F.C. 3) that Heinz was barred from raising any exemption other than subs. 20(1) on a s. 44 application. Layden-Stevenson J. rejected the Attorney General's argument. In doing so, she relied on *Siemens Canada Ltd. v. Canada (Minister of Public Works and Government Services)*¹² as authority for the proposition that if the s. 24 mandatory exemption is available to a third party, so too must be the mandatory exemption provided in s. 19 ATIA. To hold otherwise would, in her view, "yield an irrational and illogical result and one that is contrary to the principles of statutory interpretation". In the result, Layden-Stevenson J. ordered the severance of certain records containing personal information.

The Attorney General appealed to the Federal Court of Appeal ([2005] 1 F.C.R. 281 (C.A.)). Nadon J.A., writing for the Court, concluded that *Siemens* was indistinguishable from the case before the Court, and thus dismissed the appeal. The Attorney General then sought and obtained leave to appeal the matter to the Supreme Court of Canada.

Decision

The appeal was dismissed.

Reasons

The Supreme Court of Canada has stated on numerous occasions that the *Privacy Act* and the ATIA must be read together as a "seamless code": *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian*

12 (2001), 213 F.T.R. 125, 2001 FCT 1202, aff'd (2002) 21 C.P.R. (4th) 575, 2002 FCA 414.

Mounted Police), [2003] 1 S.C.R. 66, 2003 SCC 8, at para. 22. The right of access to government information, while an important principle of Canada's democratic system, cannot be read in isolation from an individual's right to privacy. By including a mandatory privacy exemption in the ATIA itself, Parliament ensured that both statutes recognize that the protection of the privacy of individuals is paramount over the right of access, except as prescribed by law. Where a third party becomes aware that a government institution intends to disclose a record containing personal information, nothing in the plain language of the ATIA, and in particular ss. 28, 44(1) and 51 thereof, prevents the third party from raising the privacy exemption set out in subs. 19(1) on a s. 44 application for judicial review. What matters is not how the reviewing court became aware of the government's wrongful decision to disclose personal information, but the court's ability to give meaning to the right to privacy. A reviewing court is in a position to prevent harm from being committed and the statutory scheme imposes no legal barrier to prevent the court from intervening. An interpretation of s. 44 that forces an individual to wait until the personal information is disclosed and the damage is done, or that imposes an onerous burden on the person seeking to avert the harm, fails to give actual content to the right to privacy and also fails to satisfy the clear legislative goals underlying the ATIA and the *Privacy Act*.

In the view of the majority, neither *Saint John Shipbuilding*¹³ nor *Siemens* provided the Court with specific reasoning on the proper scope of a s. 44 application. More importantly, the s. 19 exemption differs markedly in nature, purpose and application from the exemption provisions raised in the prior cases. Parliament's harmonized design of access to information and privacy legislation clearly indicates, as the Supreme Court's jurisprudence has confirmed, that the ATIA and the *Privacy Act* must be read together, with special emphasis given to the protection of personal information. The Court also rejected the conclusions of the Federal Court, Trial Division in *SNC Lavalin Inc. v. Canada (Minister for*

13 (1988), 24 F.T.R. 32 (F.C.T.D.), aff'd (1990), 107 N.R. 89 (F.C.A.).

International Cooperation), [2003] 4 F.C. 900, which had considered whether a third party could raise the s. 19 exemption on a s. 44 application.

Parliament has created a legislative scheme which, while intended to ensure access to information on the one hand and protect individual privacy on the other, consistently protects personal information. As a result of these tightly interlaced legislative histories, s. 44 cannot be interpreted simply with regard to the purpose of the ATIA, but must also be understood with reference to the purpose of the *Privacy Act*.

The intimate connection between the right of access to information and privacy rights does not mean that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the ATIA and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the ATIA. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the ATIA.

In the specific circumstances of the case at bar, the Privacy Commissioner and the Information Commissioner are of little help because, with no power to make binding orders, they have no teeth. Where, as here, a party seeks to *prevent* the disclosure of information as opposed to requesting its release, the Commissioners' role is necessarily limited by an inability to issue injunctive relief or to prohibit a government institution from disclosing information. Section 44 is therefore the sole mechanism under either the ATIA or the *Privacy Act* by which a third party can draw the court's attention to an intended disclosure of personal information in violation of s. 19 of the ATIA, and by which it can seek an effective remedy on behalf of others whose privacy would be affected by the disclosure of documents for which the third party is responsible.

A review under s. 44 of the ATIA is triggered by a third party's right to notice where requested records may contain confidential business information. While the notice provisions relating to the disclosure of confidential business information necessarily limit the availability of a s. 44 review, the plain language of ss. 28, 44 and 51 of the ATIA does not explicitly restrict the scope of the right of review. Rather, the plain language of the statute, together with the legislative context and combined purposes of the ATIA and *Privacy Act*, provides ample foundation for the conclusion that the reviewing court has jurisdiction to protect personal information on a third party application for review.

A basic premise of the ATIA is that personal information will not be disclosed in violation of the mandatory prohibition set out in s. 19. The access to information and privacy scheme is founded on the assumption that government institutions will respect the mandatory prohibition on disclosing personal information and that no notice is therefore required for personal information relating to individuals. In the specific circumstances in which the ATIA does authorize the disclosure of personal information – where the information is already publicly available, where the individual to whom the information relates consents, or where there is an overriding public interest – a notice provision is either superfluous or has in fact been provided for in the legislative scheme (e.g. s. 8(5) of the *Privacy Act*). Given this underlying presumption that personal information will not be disclosed as well as the paramount importance of individual privacy, it would therefore be absurd *not* to allow third parties to use the mechanism provided for by the legislature to prevent a violation of the spirit and the letter of the ATIA and the *Privacy Act*. Allowing Heinz to raise the s. 19 exemption on a s. 44 review does not create a “second tier” of third parties, but allows the *only* third party who has access to s. 44 to use this remedy to prevent harm from occurring needlessly.

Having found that a third party can raise the s. 19 exemption on an application for review under s. 44, the Court concluded that Heinz need not seek review under s. 18.1 of the *Federal Courts Act* because s. 44 already provides an alternate remedy.

Reasons

The parties agreed that the applicable standard of review is that of correctness.

Under a strict reading of the PA and its s. 41, the Federal Court does not have the jurisdiction to review a decision such as the present one, where personal information has not been withheld, but instead disclosed without authorization.

Section 18.1 of the *Federal Courts Act* grants the Federal Court a broader jurisdiction to hear reviews of federal commission decision but its powers are not absolute. The powers of the Federal Court to remedy a situation are more or less limited to the powers conferred on the initial deciding body.

The Privacy Commissioner's remedial powers, as such, are restricted to making findings and recommendations which are non-binding on the RCMP. The Privacy Commissioner has no authority, implicit or otherwise, to act as an adjudicator by making binding determinations on the parties to a complaint, nor does the PA allow the Privacy Commissioner to award any such remedial relief. The PA remedies are found in ss. 35 and 37 and are both restricted to the issuance of non-binding findings and recommendations.

It is trite law that the jurisdiction of a statutory body (such as the Privacy Commissioner) is limited to what the legislator decided it should be. A proper reading of the PA and especially s. 35 make it clear that Parliament wanted the Privacy Commissioner to be limited to a power of recommendation and no more. The term "recommendation" should be given its ordinary meaning—the offering of advice that is not binding.

General principles of statutory interpretation suggest that a Court should not add powers to the jurisdiction of a statutory body when the legislative provisions creating this body are clear and not subject to interpretation. The Federal Court's jurisdiction to review decisions of the Privacy Commissioner is found in s. 41 of the PA (for those cases where access to personal information requested under s. 12 has been refused) and subs. 18.1(3) *Federal Courts Act*. In addition, the power of the Federal Court to grant a remedy in those situations is largely

restricted to those which the Privacy Commissioner itself could order, i.e., the disclosure of non-disclosed documents (ss. 48-50 PA and subs. 18.1(4) *Federal Courts Act*). Here, no such information has remained undisclosed, and so this remedy would not be appropriate.

The words “to extend” in s. 2 of the PA cannot be interpreted as recognizing an implicit remedy of compensation given to the Privacy Commissioner. A reading of the PA makes it clear that Parliament intended for the Privacy Commissioner to be an ombudsperson, not an adjudicative body. Making recommendations and granting damages are two totally different functions. Although the 1987 *Open and Shut Report*¹⁴ noted that no civil remedies are provided in the PA and recommended that such remedies be inserted, as of today no such amendments have been made. This is not to imply that civil remedies for breach of privacy can never exist, but that under the PA, as it is currently structured, no such remedies are available.

The only remedy available from the Privacy Commissioner is that outlined in subss. 35(1) and (2): providing to both the institution and the complainant the Commissioner’s report outlining its findings and any recommendations, if appropriate, and receiving the appropriate notices where necessary. In the present case, this was done: both the RCMP and the applicant were advised that the RCMP’s actions violated the PA. No recommendations were made, therefore the RCMP did not have to respond in kind. The Privacy Commissioner committed no error in not acting further on the applicant’s complaint.

Comments

The Court noted the Privacy Commissioner’s power to comment on the situation in an annual or special report to Parliament. It also noted the availability of s. 74 of the PA which only prohibits civil or criminal actions against a government institution for the wrongful disclosure of personal information where this

14 Report of the Standing Committee on Justice and Solicitor General entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*.

disclosure is done in good faith. The Court added that if the applicant can show bad faith on the part of the RCMP, then it is possible that the applicant may have an action against the RCMP under the common law.

The decision refers to the applicant's statement of claim filed with the Queen's Bench of Alberta against certain members of the RCMP.

Mr. Murdoch has filed an appeal against this decision.

LES VIANDES DU BRETON INC. V. CANADIAN FOOD INSPECTION AGENCY**INDEXED AS: VIANDES DU BRETON INC. V. CANADA (CANADIAN FOOD INSPECTION AGENCY)**

File Nos.:	T-984-05
Reference:	2006 FC 335
Date of decision:	March 14, 2006
Before:	Gauthier J.
Sections of <i>ATIA / PA</i> :	Ss. 2, 3, 4, 20(1)(b), 27(1), 27(3), 28, 44 <i>Access to Information Act (ATIA)</i>
Other statutes:	<i>Canadian Food Inspection Agency Act, S.C. 1997, c. 6, s. 13(3); Veterinary Surgeons Act, R.S.Q., c. M-8, ss. 7, 8 and Code of Ethics of Veterinary Surgeons, R.Q., c. M-8, r. 4.01, s. 24; Professional Code, R.S.Q., c. C-26; Civil Code of Québec, S.Q. 1991, c. 64, art. 2588; Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 9</i>

Abstract

- Application for review of a decision of the CFIA to release inspection reports relating to the third party
- The CFIA complied with its duty of procedural fairness
- Para. 20(1)(b) of the ATIA not applicable
- Inspection reports not covered by veterinary surgeons' professional secrecy

Issue

- (1) Whether the CFIA breached its duty of procedural fairness by failing to give to the third party a copy of the access request and by failing to give (or by giving insufficient) reasons for its decision.
- (2) Whether inspection reports are protected by para. 20(1)(b) of the ATIA and by veterinary surgeons' professional secrecy which may be waived only by the third party.

Facts

This was an application by Viandes du Breton (the applicant) under s. 44 of the ATIA for review of a decision of the Canadian Food Inspection Agency (the CFIA) to release inspection reports made in 2003 and 2004.

The CFIA received an access request in respect of, *inter alia*, [TRANSLATION] “entry and assessment reports relating to the slaughterhouses and processing units [...] (form AGR-1427)” of the applicant. Because those records contained third party information, the CFIA first gave the applicant notice of its intent to disclose the inspection reports. The applicant made representations which, in the opinion of the CFIA, did not meet the criteria for the exemptions set out in subs. 20(1) of the ATIA. The CFIA therefore informed the applicant of its rights under s. 44.

In support of its application for judicial review, the applicant argued that the CFIA had breached its duty of procedural fairness by failing to provide it with a copy of the access request and that the CFIA failed to give reasons or gave insufficient reasons. More specifically, the applicant asserted that the “entry and assessment reports” are not inspection reports and, therefore, that if it had obtained a copy of the access request it would have been able to make the argument that there were no records that were responsive to the access request. On the question of the duty to provide reasons, it argued that the CFIA had a duty to describe, in its s. 28 notice, its rationale in greater detail in relation to each of the arguments that the applicant had raised in response to the notice under subs. 27(1) of the ATIA. The applicant also argued that the inspection reports could not be disclosed because they fell within the exemption set out in para. 20(1)(b) and, moreover, were protected by veterinary surgeons’ professional secrecy, which may be waived only by the applicant.

Decision

The application for review was dismissed with costs.

Reasons

The Court started by determining the standard of review that applied to the decision. On the first point raised, the breach of the duty of procedural fairness, the Court reiterated that it was required to intervene if a breach were found to have occurred.¹⁵ On the second point, the exemption to disclosure under subs. 20(1) of the ATIA and the protection conferred by veterinary surgeons' professional secrecy, the Court concluded that because these were questions of mixed fact and law, it had to apply the standard of review of correctness.¹⁶

Issue 1

Relying on *Baker*,¹⁷ the Court examined the content of the duty of procedural fairness by analyzing the context of the ATIA and the rights in question. Applying *Baker*, three factors were considered. First, the nature of the decision and the process provided for by the ATIA; second, the nature of the statutory scheme; and third, the impact of the decision. In its contextual analysis, the Court concluded that the duty of procedural fairness that applied in this case did not require that a copy of the access request be provided to the applicant. However, the Court said that the CFIA was required to describe the subject matter of the request accurately and in sufficient detail and that it was satisfied with the description provided. The Court added, in *obiter*, that it would be wise, in future, for the CFIA to quote the description in the access request *verbatim* and confirm that the requirements of s. 4 of the ATIA (right of access) had in fact been met. The Court also stated that it was satisfied that the duty to give reasons for the decision had been met by the CFIA. Having regard to the discussions between the parties, the nature of the records to be disclosed and the access request, the CFIA was not required to provide further details than those it provided in its s. 28 letter. The Court therefore concluded that the CFIA had not breached its duty of procedural fairness.

15 *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195, 2004 FCA 49, paras. 42 to 45.

16 *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)* (2003), 241 F.T.R. 160, 2003 FCA 257.

17 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 21.

Issue 2

The Court had to consider whether the records were protected by the exemption set out in para. 20(1)(b)¹⁸ of the ATIA and by the veterinary surgeons' professional secrecy. Relying on *Canada Packers*,¹⁹ the Court concluded that para. 20(1)(b) was not relevant in this case because none of the information in the inspection reports had been supplied by the applicant, and it consisted, rather, of judgments by government inspectors regarding what they themselves had observed. The Court further concluded that the information in the reports should not be treated as confidential. It adopted the comments made by Pinard J. in *Coopérative fédérée du Québec*,²⁰ that "these records are collected by a government agency and in legal terms constitute records of the Government of Canada". The Court noted that the applicant was legally required to submit to inspection by the CFIA and that the fact that it had opened its doors to the CFIA inspectors did not mean that it had provided the information in the reports itself. The Court also concluded that, having regard to its past experience, the applicant should have known that inspection reports were, in general, disclosed.²¹ The fact that the applicant treated the reports as confidential internally does not change how the CFIA treats them and the principles set out in the ATIA.

Relying on s. 24 of the *Code of Ethics of Veterinary Surgeons*, the applicant argued that it had not waived the professional secrecy by which the inspectors – veterinarians – are bound and citing art. 2588 of the *Civil Code of Québec* and s. 9 of the Quebec *Charter of Human Rights and Freedoms*, it asked that the veterinary surgeon's duty of professional secrecy to the client be honoured. The

18 The applicant stated at the hearing that it did not intend to argue the exemptions set out in paras. 20(1)(c) and (d) of the ATIA.

19 *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.), para. 13.

20 *Coopérative fédérée du Québec v. Canada (Agriculture and Agri-food)* (2000), 180 F.T.R. 205 (F.C.T.D.), para. 16.

21 *Supra*, footnote 2, *Intercontinental Packers Ltd. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (F.C.T.D.), *Gainers Inc. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 133 (F.C.T.D.), *aff'd* (1988), 87 N.R. 94 (F.C.A.), *Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-food)* (2000), 198 F.T.R. 233 (F.C.T.D.).

CFIA argued that the *Canadian Food Inspection Agency Act* did not require that the inspectors be veterinarians and that even if this were the case their issuance of inspection reports had nothing to do with the practice of that profession. The Court was not satisfied that inspections and issuance of reports are acts that fall under the *Veterinary Surgeons Act* and that the applicant is actually the client of the veterinary surgeon inspectors, and found that the reports were not subject to professional secrecy.

Comments

The applicant, Viandes du Breton, has appealed this decision.

INFORMATION COMMISSIONER OF CANADA V. MINISTER OF INDUSTRY**INDEXED AS: CANADA (INFORMATION COMMISSIONER) V. CANADA (MINISTER OF INDUSTRY)**

File No.:	T-421-04
Reference:	2006 FC 132
Date of decision:	February 13, 2006
Before:	Kelen J.
Sections of <i>ATIA / PA</i> :	Ss. 19(2)(c), 24(1), 42, 48 <i>Access to Information Act</i> (ATIA); s. 8(2)(k) <i>Privacy Act</i> (PA)
Other statutes:	<i>Statistics Act</i>, R.S.C. 1985, c. S-19, ss. 17(1)(b), 17(2)(d); <i>Constitution Act, 1982</i>, ss. 35, 52.

Abstract

- Refusal of Chief Statistician to release certain census records to Algonquin Bands
- Whether s. 17(1) *Statistics Act* prohibits disclosure of census records
- S. 17(1) prohibition subject to exception in s. 17(2)(d) *Statistics Act* where “information available to the public under any statutory or other law”
- S. 8(2)(k) PA “statutory law” within meaning of s. 17(2)(d) *Statistics Act*
- Records available to Algonquin Bands as member of the public by virtue of s. 35 *Constitution Act, 1982*, common law duties and s. 8(2)(k) PA

Issue

- (1) Are the census records necessary for the land claim?
- (2) Are the census records subject to production under the ATIA?
- (3) Is s. 35 of the *Constitution Act, 1982*, considered “statutory or other law” within the meaning of para. 17(2)(d) of the *Statistics Act*?
- (4) Is para. 8(2)(k) of the PA considered “statutory or other law” within the meaning of para. 17(2)(d) of the *Statistics Act*?

- (5) What is “information available to the public” within the meaning of para. 17(2)(d) of the *Statistics Act*?
- (6) In the alternative that the respondent was prohibited from disclosing census records pursuant s. 17 of the *Statistics Act*, what would be the effect of s. 52 of the *Constitution Act, 1982*?

Facts

This is a s. 42 ATIA application for review of the refusal of the Chief Statistician of Canada to disclose certain census records for the years 1911²², 1921, 1931, and 1941 to Algonquin Bands for the purpose of validating a land claim. The request for access was denied on the grounds that subs. 17(1) of the *Statistics Act* prohibits the disclosure of individual census records, that para. 8(2)(k) of the PA is subject to subs. 17(1) of the *Statistics Act* and therefore cannot be applied and that there is no obligation owed to the Algonquin Bands to disclose the records. Following a complaint and investigation, the Information Commissioner recommended disclosure of the records.

For the purpose of a successful claim, the Bands need to prove continuity of occupation for the 20th century to 1951. It is alleged that the census records under the control of Statistics Canada constitute accurate proof of who was living in the territory in question at the time.

Decision

The application for judicial review was allowed, the decision of Statistics Canada set aside and the access request referred back to the Chief Statistician with directions to consider the request under para. 17(2)(d) of the *Statistics Act*, and with additional direction that the census records for 1921, 1931 and 1941 can be disclosed to the requester on behalf of the Algonquin Bands upon his undertaking that the personal information with respect to non-Aboriginal persons in the census records be kept confidential.

22 Since the access request was submitted, the *Statistics Act* has been amended to release the 1911 census records to the public: see S.C. 2005, c. 31, s. 1.

Reasons

The Court agreed, at the outset, that the appropriate standard against which to review the decision of the Chief Statistician is correctness.

Issue 1

The Court was satisfied that the census information sought was necessary and important for the Algonquin Bands to properly document their land claim. The Court was of the view that the census information was probably the best evidence of the proof required by the Bands to complete the evidence of their continued occupation of the territory in question.

Issue 2

This issue involves the interplay of four statutes, namely the ATIA, the PA, the *Statistics Act* and the *Constitution Act, 1982*. The right of access is attenuated by s. 24 of the ATIA, which requires consideration of the disclosure prohibition in subs. 17(1)²³ of the *Statistics Act*. However, subs. 17(2) of the *Statistics Act* contains, at para. (d), an exception to the prohibition which authorizes the disclosure, by order, and at the discretion of the Chief Statistician, of “information available to the public under any statutory or other law”. The Court was of the view that the subs. 17(1) prohibition must be read subject to the discretionary exceptions set out in subs. 17(2) of the *Statistics Act* and that other statutory provision or law making the information available should be considered. More particularly, the meaning of para. 17(2)(d) of the *Statistics Act* involved, in the

23 17. (1) Except for the purpose of communicating information in accordance with any conditions of an agreement made under section 11 or 12 and except for the purposes of a prosecution under this Act but subject to this section,

- (a) no person, other than a person employed or deemed to be employed under this Act, and sworn under section 6, shall be permitted to examine any identifiable individual return made for the purposes of this Act; and
- (b) no person who has been sworn under section 6 shall disclose or knowingly cause to be disclosed, by any means, any information obtained under this Act in such a manner that it is possible from the disclosure to relate the particulars obtained from any individual return to any identifiable individual person, business or organization.

present case, a three-step analysis to be undertaken in the sequence set out under Issues 3, 4 and 5.

Issue 3

The duty to act honourably, in good faith and as a fiduciary are common law duties that have now been constitutionalized to the extent that they relate to the Crown's legal obligations under s. 35 of the *Constitution Act, 1982* with respect to aboriginal land claims. As a result, s. 35 of the *Constitution Act, 1982*²⁴, and those common law duties constitute "statutory or other law" within the meaning of para. 17(2)(d) of the *Statistics Act*. The Court's view was based on the Supreme Court of Canada decisions in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

Issue 4

The Court held that para. 8(2)(k) of the PA constituted "statutory law" within the meaning of para. 17(2)(d) of the *Statistics Act*. Parliament's intention in enacting para. 8(2)(k) was obvious. As stated by the Court, the intent is that "personal information under the control of a government institution may be disclosed to an Indian Band for the purpose of researching or validating a land claim".

Issue 5

The Court held that the phrase "information available to the public" in para. 17(2)(d) of the *Statistics Act* is a question of law to be determined with the aid of Canadian dictionaries. The word "public" in para. 17(2)(d) is used as a noun and, as such, refers to the entirety of the community, to members of the community, or to the community sharing a common status or interest. The Court noted that each of these meanings is sufficient to meet the definition of "public" in para. 17(2)(d). The word "available" means "capable of being used; at one's

24 S. 35 of the *Constitution Act, 1982* provides for the recognition of existing and treaty rights of aboriginal peoples. Under s. 35, treaty rights include "rights that now exist by way of land claims agreements or may be so acquired".

disposal; obtainable”. Thus, the Court held that the expression “information available to the public” refers to records capable of being obtained by the entire general public, or by member or sections thereof. To be capable of obtaining a given record, the member of the public must have a right of access.

In the alternative that the meaning of the phrase “available to the public” was unclear, the Court referred to the appropriate approach to statutory interpretation which is to read the words of a statute in their entire context, liberally construed and in their ordinary sense in accordance with the intention of Parliament. The Court held, based on this approach, that the information in the census records is exactly the type of information which Parliament intended disclosure to an Aboriginal people or Indian Band under the PA. It is also exactly the kind of information which the Crown is obliged to provide an Aboriginal people or Indian Band under s. 35 of the *Constitution Act, 1982*.

In conclusion, with respect to Issues 3, 4 and 5, the Court held that para. 17(2)(d) of the *Statistics Act* was engaged because a member of the public, i.e. the Algonquin Bands, have a right of access to the information by statute or other law, namely s. 35 of the *Constitution Act, 1982*, the common law duties referred to under Issue 3 and para. 8(2)(k) of the PA. The Court noted that only one statute or common duty is sufficient to satisfy the requirement of para. 17(2)(d) of the *Statistics Act*.

Issue 6

Subsection 52(1) of the *Constitution Act, 1982* provides that any law that is inconsistent with the Constitution of Canada is, to the extent of the inconsistency, of no force or effect. The Crown has a constitutional obligation, independent of the ATIA, to provide Algonquin Bands with those parts of the census records required to prove their land title claim. Pursuant to the principle of primacy of the Canadian Constitution found in s. 52 of the *Constitution Act, 1982*, and to the extent that s. 17 of the *Statistics Act* is inconsistent, s. 17 is of no force or effect unless it can be justified.

In the present case, the Court held that s. 17 did not meet the test for justifying an interference with the right of the Aboriginal peoples to obtain their own census records necessary to prove their land title claims. While the confidentiality of census records are necessary to ensure full and frank responses to enumerators, the census records sought are more than 60 years old, and can be disclosed subject to a confidentiality undertaking by the requester.

Comments

The Minister of Industry has filed a notice of appeal against this decision.

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

File No.: **T-2073-00**
Reference: **2005 FC 1551**
Date of decision: **November 17, 2005**
Before: **Mosley J.**
Sections of *ATIA / PA*: **Ss. 23, 25 *Access to Information Act (ATIA)***

Abstract

- Effect of s. 25 (severance) on s. 23 (solicitor-client privilege exemption)
- Records subject to s. 23 to be severed in same manner as any other record
- Information that can stand alone must be severed, unless such release compromises the solicitor-client privilege
- Severance must be reasonable
- Disclosure of privileged records by the Crown in criminal proceedings not amounting to waiver
- Partial disclosure of privileged documents under the ATIA not amounting to waiver of the entire document

Issue

- (1) Does solicitor-client privilege attach to the entire document or only to those parts of the document which provide legal advice?
- (2) If a privileged document contains within it a listing of other documents, which may or may not be covered by the privilege, should the list be severed from the privileged document and released?
- (3) What is the effect of the release of information to satisfy the Crown's constitutional obligations for disclosure in criminal prosecutions as opposed to voluntary waiver?
- (4) Does partial disclosure under the *Access to Information Act* of a document for which solicitor-client privilege is claimed amount to waiver of privilege for the entire document?

Facts

The applicant (Mr. Blank) sought access to records held by the department of justice which related to prosecutions of Mr. Blank himself and gateway industries inc. For regulatory offences under both the *Fisheries Act* and the *Pulp and Paper Effluent Regulations*. The department released some records and withheld others pursuant to ss. 13 (information obtained in confidence), 19 (personal information), 21 (advice and recommendations) and 23 (solicitor-client privilege) of the ATIA. The applicant filed a complaint with the information commissioner. An investigation ensued and following the information commissioner's recommendations and report, the applicant sought judicial review pursuant to s. 41 of the ATIA. The applicant succeeded in part on the s. 41 review (2003 fct 462) and appealed the determination on which he was not successful to the federal court of appeal. The minister cross-appealed. In dismissing both the appeal and the cross-appeal, the fca remitted the matter to the federal court for determination of whether the s. 25 ATIA requirements had been complied with (2004 fca 287) as this question had apparently not been raised in the initial review application. Thus, the present proceedings required this court to determine whether the minister had met his s. 25 obligation to sever accessible information and whether additional information could be severed from the records. The material before the court consisted, for the most part, of records exempted pursuant to s. 23 ATIA

Decision

Records released to the applicant in other proceedings and which the respondent agreed to release in whole or in part prior to and during the hearing are to be released. Some additional information was ordered to be severed and released. Several documents exempted in their entirety were lawyer's work product including draft court submissions or draft communications to opposing counsel. In those cases, the entire document was privileged and not severable.

Reasons

Issue 1: Does solicitor-client privilege attach to the entire document or only to those parts of the document which provide legal advice?

Citing the decision of the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, the Court held that where a communication between solicitor and client takes place for the purpose of conveying or receiving information on matters of fact, the communication is not privileged and may be obtained on discovery in civil proceedings. The Court added, however, that a privileged communication does not lose its privilege merely because it contains matters of fact which are not privileged, and that in those instances, the matters of fact can be severed from the privileged communication for the purpose of discovery. Where, as in this instance, a claim of solicitor-client privilege may conflict with the public's right to access information in the hands of the government, one must note the paramount nature of s. 25 ATIA. Thus, it was the Court's view that documents determined to be subject to the exemption provided by s. 23 are to be severed in the same manner as any other document subject to severance and that information that can stand alone, without compromising the privilege, must be severed and released.

However, severance must be reasonable. On this point, the Court held that "severance within a document under section 25 is only to be affected where it is reasonable to do so. Reasonableness requires that the severed information be capable of standing independently and that severance must not result in the release of meaningless words and phrases out of context or provide clues to the content of the exempted portions. Severance must be done bearing in mind the importance of impairing solicitor-client privilege as little as possible."

Issue 2: If a privileged document contains within it a listing of other documents, which may or may not be covered by the privilege, should the list be severed from the privileged document and released?

Based in large part on the analysis entertained above, the Court stated that there is no principled basis to withhold lists of additional documents and that such lists

should be treated like other information contained in the privileged communication. That is to say, any information which can be reasonably severed from the privileged communication, including a list of other documents, should be severed pursuant to s. 25. The severance provision in s. 25 should apply consistently to all types of information. If solicitor-client privilege is claimed for one or more of the listed documents, disclosure of the list should not compromise the privilege claimed in that document. The privilege in the document remains until such time as its content is disclosed.

Issue 3: What is the effect of the release of information to satisfy the Crown's constitutional obligations for disclosure in criminal prosecutions as opposed to voluntary waiver?

Where the disclosure of a document is compulsory, implied waiver does not occur. Disclosure is compulsory in criminal proceedings based on the principle developed in *R. v. Stinchcombe*, [1993] 3 S.C.R. 326. As a result, disclosure of a document based on the Crown's obligations to a defendant in a criminal proceeding should not be considered as implied waiver.

In *obiter*, the Court reiterated the well established principle that "laws requiring disclosure in other legal proceedings cannot narrow or broaden the scope of disclosure required by the *Access to Information Act*". Thus, in determining whether appropriate disclosure has been made under the ATIA, a court should consider only the ATIA and the caselaw guiding its interpretation.

Issue 4: Does partial disclosure under the *Access to Information Act* of a document for which solicitor-client privilege is claimed amount to waiver of privilege for the entire document?

The partial disclosure of documents to the requester under the ATIA cannot be taken as waiver of privilege over the entire document. Release under the Act is done for the purpose of providing statutorily required disclosure and has no effect upon the status of the documents as privileged. Portions of the document may be

released due to legal obligations on behalf of the Crown, but this does not constitute waiver.

Comments

The Crown is appealing this decision. Mr. Blank has cross-appealed.

JANSSEN-ORTHO INC. V. MINISTER OF HEALTH**INDEXED AS: JANSSEN-ORTHO INC. V. CANADA (MINISTER OF HEALTH)**

File Nos.:	T-2201-00
References:	2005 FC 1633
Date of decisions:	July 14, 2005
Before:	Simpson J.
Sections of <i>ATIA / PA</i> :	Ss. 19(1), 19(2), 20(1)(b), 20(1)(c), 25 and 44 <i>Access to Information Act (ATIA)</i>; s. 3(i) <i>Privacy Act (PA)</i>

Abstract

- S. 44 ATIA judicial review against decision to disclose third party's records regarding a medication withdrawn from the Canadian market following a number of adverse drug reaction reports
- Names of third party's employees personal information
- Third party's references to published studies it considers reliable protected under para. 20(1)(b)
- Lack of evidence regarding confidentiality of adverse reaction reports
- Whether passage of time may result in loss of confidentiality and commercial nature of information to be determined on a case-by-case basis
- Para. 20(1)(c) harm contemplates harm to third party, not to the "public interest"
- "Material financial loss" not covering litigation costs and damage awards

Issues

- (1) Should the information contained in the third party's records be exempted from release pursuant to subs. 19(1) ATIA as constituting personal information of the employees of Janssen-Ortho Inc.?
- (2) Should the records that Health Canada seeks to disclose be exempted from release pursuant to para. 20(1)(b) ATIA?

- (3) Should the records that Health Canada seeks to disclose be exempted from release pursuant to para. 20(1)(c) ATIA?

Facts

Health Canada received a request for access which related, in part, to the discussions held in 1999 and 2000 between Health Canada and Janssen-Ortho Inc. (JOI) about the safety of Prepulsid, a medication used to treat gastrointestinal disorders, and about its withdrawal from the Canadian market. The request encompassed “briefing notes, media lines, testing, [...] the department's actions in assessing prepulsid, including their knowledge of its adverse effects, other countries' actions, their review of the drug's approval and use for a decade, and consumer, users' feedback and exchanges with Janssen-Ortho Inc., on its use, and withdrawal”. After consultations with JOI, Health Canada reduced the number of records to be disclosed, but nonetheless was prepared to disclose the balance of the records on the basis that they did not qualify for exemption under the Act. JOI filed an application under s. 44 ATIA challenging the proposed disclosure by Health Canada. The records at issue were divided into the following categories: personal information; research reports (an “Appraisal Report” and a “Summary”); suspect adverse reaction reports and miscellaneous items including presentation slides and correspondence.

Decision

The application for judicial review was allowed in accordance with the reasons for judgment.

Reasons

Under s. 44 ATIA, the Federal Court is required to conduct a *de novo* review of the records Health Canada proposes to disclose. Exceptions to the right of access should be limited and specific and the burden of persuasion rests upon the party resisting disclosure, i.e. JOI. The standard of proof to be applied in reviewing exemptions under subs. 20(1) of the Act is that of a balance of probabilities.

Issue 1

Under subs. 19(1) ATIA, subject to subs. 19(2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s. 3 of the *Privacy Act*. No employee of JOI consented to the release of his/her name and it was not suggested that the disclosure was in accordance with s. 8 of the *Privacy Act*. Citing para. 3(i) of the *Privacy Act*, Simpson J. held that the disclosure of the JOI employees' names would reveal information about them (such as the fact that the employees attended meetings, wrote letters and authored studies regarding the drug's safety) which is not in the public domain as the public is unaware of their involvement or their opinions, suggestions and conclusions.

Issue 2

The Court adopted the approach articulated in *Air Atonabee v. Minister of Transport* (1989) 27 C.P.R. (3d) 180 (F.C.T.D.) regarding para. 20(1)(b) ATIA, which protects on a mandatory basis financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party. Information is confidential if it meets the following criteria:

(a) it is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his or her own initiative;

(b) it originates and is communicated in a reasonable expectation of confidence that it will not be disclosed; and

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

Issue 3

Paragraph 20(1)(c) ATIA protects on a mandatory basis information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party. Both of these circumstances require a reasonable expectation of probable harm, not speculation nor mere possibility of harm.

Simpson J. applied the principles respecting the interpretation of paras. 20(1)(b) and (c) to the various categories of records.

With respect to the Appraisal Report, Simpson J. observed that the fact that the Report was a summary of other exempt documents did not automatically entitle it to an exemption under the ATIA. However, although the information in dispute was largely a description of the findings in published studies which would normally be disclosed, Simpson J. applied para. 20(1)(b) ATIA on the ground that the fact that JOI considered the findings to be accurate and trustworthy has not been publicized and would only become known through disclosure. As a result, JOI's references to published studies which JOI considered reliable were exempted from disclosure. Similarly, JOI's response report to a document prepared by Health Canada (the "Summary") constituted confidential commercial information and was to be exempted in its entirety.

Adverse drug reactions reports were to be disclosed as there was no indication that they were treated confidentially by Health Canada or JOI, thus precluding the application of para. 20(1)(b) ATIA. The documents were not marked "confidential" and there was no evidence that they were submitted in confidence to Health Canada. Moreover, there was no evidence to indicate reasonable expectation of probable harm under para. 20(1)(c) ATIA. The Court noted that the harm envisaged in para. 20(1)(c) is not a "public interest" harm but rather harm to a third party and that "material financial loss" was not intended to cover litigation costs and damage awards.

With respect to the issue of confidentiality under para. 20(1)(b), Simpson J. noted that the passage of time could affect the confidentiality of information, but that

loss of confidentiality would depend on the circumstances of each case. With respect to the presentation slides, Simpson J. held that the passage of time was not relevant to the issue of confidentiality on the grounds that related litigation and drug developments were ongoing. Simpson J. rejected Health Canada's submission that since the drug had not been on the market for almost five years, the information contained in the slides could no longer be considered commercial. It was held that the passage of time had not affected the commercial nature of the information contained in the slides. In contrast, it was held that while a draft of a letter to doctors which JOI had provided to Health Canada remained confidential, it could not be protected under para. 20(1)(b) on the ground that the letter could no longer be considered commercial due to the passage of time and the specific and limited nature of the information it contained. Other categories of correspondence were protected in whole or in part.

With respect to s. 25 ATIA, Simpson J. held that the disclosure of sentences expressing courteous sentiments or conveying good wishes and gratitude did not amount to reasonable severance.

Comments

The decision has not been appealed.

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