

Federal Court



Cour fédérale

Date: 20180503

Docket: DES-4-16

Citation: 2018 FC 369

Ottawa, Ontario, May 3, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AWSO PESHDARY

Respondent

PUBLIC ORDER AND REASONS

(Top Secret Order and Reasons issued April 6, 2018)

[1] The Attorney General of Canada (AGC) requests, on grounds of national security, an Order prohibiting disclosure to Mr Awso Peshdary of information contained in two documents. The first is an affidavit filed in support of an application for warrants that this Court issued in 2012 in respect of Mr Peshdary under s 21 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, [CSIS Act]. The second is a slide presentation prepared by the Canadian Security Intelligence Service (CSIS).

[2] I received evidence and submissions from the AGC, and representations by the *amicus curiae*, Mr Ian Carter, at an oral hearing on March 21, 2018. I also received *ex parte* submissions from counsel for Mr Peshdary, Mr Solomon Friedman, at an oral hearing on March 29, 2018.

[3] The AGC and Mr Carter agree that certain information contained in the CSIS presentation should not be disclosed to Mr Peshdary as there is a clear national security interest in keeping it secret and it is of little value to Peshdary's defence. However, where the information in the presentation and the affidavit is the same, the lifting of redactions in the affidavit should result in corresponding lifts in the presentation.

[4] There is no agreement in respect of allegedly sensitive information contained in the affidavit. The AGC wishes to protect information that could serve to identify the affiant, as well as references to methods and techniques used by the service to obtain information about Mr Peshdary, and the extent of their interest in Mr. Peshdary.

[5] The affidavit was provided to a judge of this Court in support of warrants under the CSIS Act, the fruits of which nourished a subsequent warrant sought and obtained by the Royal Canadian Mounted Police to investigate Mr Peshdary in respect of suspected criminal conduct, namely, involvement in the furthering of terrorist activities. Without the information about Mr Peshdary derived from the CSIS Act warrant, the RCMP may not have had sufficient evidence to acquire a *Criminal Code* authorization, and may not have assembled the evidence relied on for the charges that were subsequently laid against Mr Peshdary. In other words, the charges Mr Peshdary faces are traceable directly to warrants issued by this Court. At his trial, Mr Peshdary

intends to challenge the validity of the CSIS Act warrants and, in order to do so, he submits, he needs to understand the basis on which those warrants issued; that is, he requires access to the supporting affidavit.

[6] The trial judge, the Honourable Julianne Parfett of the Superior Court of Justice of Ontario, has already seen the affidavit and has ruled that much of it is relevant to Mr Peshdary's defence. Unless the AGC can point to national security grounds that supersede Mr Peshdary's interests in making full answer and defence to the charges against him, the contested information should be disclosed.

[7] Mr Carter agrees that the affiant's identity should be protected. However, he points out that much of the information the AGC is unwilling to disclose relates to the background and expertise of the affiant. The affiant's knowledge and experience would have been important factors for the issuing judge to consider in weighing the evidence set out in the affidavit and, accordingly, that information, submits Mr Carter, should be disclosed to Mr Peshdary. Mr Carter proposes that certain details be redacted or substituted with more general information. I agree. I have set out in the Annex appropriate redactions and substitutions that should be made, most of them in accordance with Mr Carter's suggestions.

[8] As for the other proposed redactions, the AGC argues that there is a strong national security interest in protecting CSIS's methods, techniques and interests. In particular, the AGC points out that disclosing the methods and techniques employed by CSIS will also disclose gaps

and limitations in its powers. Releasing information about CSIS's interests will alert potential persons of interest and may cause them to take evasive action.

[9] While I accept the AGC's position that there is a general national security interest in protecting from disclosure methods and techniques employed by CSIS, and their interest in certain persons or activities, I find that the national security interest is outweighed in this case by the public interest in disclosure to Mr Peshdary.

[10] In order to mount a challenge to the validity of the CSIS Act warrants, which he is fully entitled to pursue, Mr Peshdary will need access to much of the information the affiant put before the issuing judge in support of the request. Mr Peshdary will then be able to challenge the validity of the warrant on the face of the information provided, or compare that information against other evidence to determine whether the affiant met the obligation to provide the Court with full, frank, and fair disclosure of all the relevant circumstances.

[11] There is a strong interest in permitting the person charged with serious criminal offences a meaningful opportunity to mount a full answer and defence to those charges. Further, some of the matters that CSIS seeks to protect, while not explicitly in the public domain, can readily be inferred from the circumstances. For example, CSIS does not wish to disclose the fact that previous warrants were obtained in respect of Mr Peshdary. However, it is already publicly known that a warrant was issued against him in 2009 and, obviously, in 2012. It can reasonably be inferred that other warrants issued in 2010 and 2011

[12] For present purposes, however, I see no reason why Mr Peshdary needs to know the particular kinds of intercept that were employed. Accordingly, I would preserve the redactions relating to that information.

[13] In the chart I have set out in an Annex, I have listed the redactions sought by the AGC and my response to them, in keeping with the foregoing reasons.

[14] As a final matter, I have preserved the redactions the AGC sought under s 18.1 of the CSIS Act in respect of human sources, and those that might inferentially disclose a human source.

PUBLIC ORDER in DES-4-16

THIS COURT ORDERS that:

1. The materials in issue shall be disclosed to Mr Peshdary in accordance with the instructions set out in the Annex.
2. The Attorney General of Canada shall advise the Court within 3 days of any concerns about releasing this Order and Reasons publicly. The *amicus* may make responding submissions within 2 days of receiving the AGC's submissions.


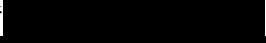


“James W. O’Reilly”

Judge



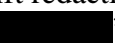
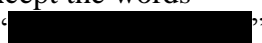


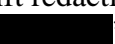
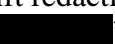
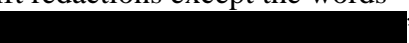
Annex

Paragraph Number/Page Reference	Text	Action Ordered
Para. 1	“in 2002”	replaces: “████████████████████”
Para. 2	“For four years” “████████████████████” “a region other than the Middle East”	replaces: “████████████████████” “████████████████████” remains redacted replaces: “████████████████████” ████████████████████
Para. 3	“For two years” “████████████████████” “a region other than the Middle East”	replaces: “████████████████████” “████████████████████” remains redacted replaces: “████████████████████” ████████████████████
Para. 4	“For two years I worked in a senior capacity dealing with a region other than the Middle East”	replaces para. 4
Para. 5	“These assignments were unrelated to the Middle East”	replaces: remainder of para. 5 after the first sentence
Para. 6	“For one month” “with respect to terrorist activity in the Middle East.”	replaces: “████████████████████” replaces: “████████████████████” ████████████████████”
Para. 7	“For one year” “████████████████████” ████████████████████	replaces: “████████████████████” “████████████████████” remains redacted

	“dealing with terrorist activity in the Middle East”	replaces remainder of para. 7
Para. 8	<p>“[REDACTED]”</p> <p>“of a unit dealing with terrorist activity linked to Middle East”</p> <p>“[REDACTED]”</p> <p>“terrorist activity linked to the Middle East”</p>	<p>remains redacted</p> <p>replaces: “[REDACTED]”</p> <p>remains redacted</p> <p>replaces: “[REDACTED]”</p>
Para. 9		lift redactions
Para. 10		lift redactions
Para. 11		remains redacted
Para. 14	<p>“The Service currently has warrant powers only against _____ and Peshdary”</p> <p>“with respect to Awso Peshdary, referred to as PESHADARY.”</p>	<p>should be lifted</p> <p>add to end of 3rd sentence</p>
Para. 17	“and discussed attacking the Parliament buildings and the United States (US) Embassy in Ottawa.”	lift redaction
Para. 21	“[REDACTED]”	remains redacted
Para. 22	“[REDACTED]”	remains redacted
Para. 98	“[REDACTED]”	remains redacted

Para. 99		lift redactions
Para. 100		lift redactions
Para. 101		lift redactions except the words “  ”
Para. 103		lift redactions
Para. 104		lift redactions
Para. 105	“Over the past year, the Service has faced unique challenges in its efforts to collect intelligence related to PESHADARY’s threat-related activities.”	lift redaction
Para 105	“Although recent information regarding PESHADARY’s threat-related activities is <u>not as compelling as in previous years</u> ”	lift redaction
Para 105		remainder of para. 105 remains redacted
Para. 106	“Since the current warrants were issued”	lift redaction
Para. 107	“In July 2012, an intercepted conversation between Peshdary’s wife and another woman involved the other woman’s complaint that Peshdary was attempting to radicalize her husband.”	replaces para. 107
Para. 108	“In May 2012, an intercept disclosed that”	replaces: “   ”
Para. 108		lift redaction on remainder of the first sentence, beginning with “Peshdary”
Para. 109		lift redaction except the words “  ”

Para. 110		lift redaction except the words “██████████”
Para. 112		lift redaction
Para. 115		lift redaction except the words “██████████”
Para. 117		lift redaction
Para. 120		lift redaction except the words “██████████”
Para. 121		lift redaction except the words “██████████”
Para. 122		lift redaction except the words “██████████”
Para. 123		lift redaction except the words “██████████”
Para. 124		lift redaction
Para. 125		lift redaction except the words “██████████”
Para. 126		lift redaction except the words “██████████”
Para. 127		lift redaction except the words “██████████”
Para. 128		lift redaction except the words “██████████”
Para. 129		lift redaction
Para. 130		lift redaction except the words “██████████”
Para. 131		lift redaction
Para. 132		lift redaction
Para. 133		lift redaction

Para. 134		lift redaction except the words “  ” 
Para. 135		redactions remain
Para. 137		redactions remain
Para. 139		redactions remain
Para. 141		lift redactions except the words “  ” and “  ”
Para. 142		lift redactions except the words “  ”
Para. 143		lift redactions and replace  with “Milton”
Para. 145		lift redactions except the words “  ”
Para. 146		lift redactions
Para. 147		lift redactions except the words “  ”
Para. 149		lift redactions
Para. 150		lift redactions
Para. 151		lift redactions
Para. 177		redactions remain
Para. 202		lift redactions except the words “  ”
Para. 203		redactions remain
Exhibit B		redactions remain except for the words “ and by technical intercept”
p. 72		redactions remain

p. 83		redactions remain
p. 89		lift redactions
p. 107		redactions remain
p. 108		redactions remain
p. 125		redactions remain
p. 126		redactions remain

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-4-16

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v AWSO
PESHARY

**PLACE OF *IN CAMERA*
HEARING:** OTTAWA, ONTARIO

**DATE OF *IN CAMERA*
HEARING:** MARCH 29, 2018

**PUBLIC ORDER AND
REASONS BY:** O'REILLY J.

**TOP SECRET ORDER AND
REASONS ISSUED:** APRIL 6, 2018

**PUBLIC ORDER AND
REASONS ISSUED:** MAY 3, 2018

APPEARANCES:

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Mr. Marc Edmunds

FOR THE APPLICANT

Mr. Ian Carter

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