Federal Court  Cour fédérale

Date: 20190905

Docket: T-1656-18

Citation: 2019 FC 1137

Ottawa, Ontario, September 5, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

RODERICK THOMAS MCCULLOCH RUSSELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Roderick Thomas McCulloch Russell seeks judicial review of the refusal by the Canadian Security Intelligence Service [CSIS] to grant his request for "[a]ll records without limitation or restriction, from all locations (irrespective of whether such records are physically, electronically, mechanically or otherwise held by CSIS) in respect of Roderick Thomas McCulloch Russell."

[2] Mr. Russell believes that he and his family are the victims of a coordinated and illegal campaign of persecution by CSIS and other government actors, both foreign and domestic. He says the persecution has been ongoing for more than thirty years in Canada and the United Kingdom.

[3] Mr. Russell requested access to CSIS' records under s 6 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA]. CSIS refused his request by letter dated July 4, 2014 [Refusal Letter], invoking exemptions found in ss 15(1), 16(1)(a) or 16(1)(c) of the ATIA. These exemptions are available only if the actual or hypothetical records pertain to a valid exercise of CSIS' mandate to investigate and prevent threats to Canada's national security, national defence, or international relations.

[4] Mr. Russell submitted a complaint to the Office of the Information Commissioner [OIC]. The OIC determined that CSIS' refusal to confirm or deny the existence of pertinent information in one of its Personal Information Banks [PIBs] was reasonable. The OIC also determined that CSIS' reference to PIBs in the Refusal Letter was inappropriate, and therefore concluded that Mr. Russell's complaint was well-founded and resolved.

[5] In my view, CSIS correctly found that the actual or hypothetical records requested by Mr. Russell fall within the exemptions authorized by the ATIA. CSIS' decision to apply the exemptions was reasonable. This Court has seen no evidence of a coordinated and illegal campaign of persecution by CSIS and other government actors, whether foreign or domestic, against Mr. Russell and his family.

[6] The application for judicial review is therefore dismissed.

II. Background

[7] The Refusal Letter indicated that CSIS had searched three PIBs. CSIS found that the Security Assessments/Advice PIB [CSIS PPU 005] and the Canadian Security Intelligence Service Records PIB [CSIS PPU 015] contained no personal information pertaining to Mr. Russell.

[8] However, CSIS neither confirmed nor denied the existence of pertinent records in the Canadian Security Intelligence Service Investigational Records PIB [CSIS PPU 045], citing s 10(2) of the ATIA. The Refusal Letter also stated that, pursuant to s 10(1)(b) of the ATIA, if such records existed then they "could reasonably be expected to be exempted under one or more of sections 15(1)…, 16(1)(a), or (c), of the [ATIA]."

[9] In his complaint to the OIC, Mr. Russell asserted that CSIS had improperly applied exemptions to unjustifiably deny him access to records. He also complained that CSIS had failed to provide him with all records that were responsive to his request.

[10] The OIC investigated Mr. Russell's complaints separately. It assigned file number 3214-00850 to his complaint concerning the exemptions claimed by CSIS, and file number 3214-00851 to his complaint concerning the sufficiency of the search.

[11] On August 1, 2018, the OIC issued its Report of Findings summarizing the results of its investigation regarding file number 3214-00850 [850 Report]. The OIC concluded that "CSIS' reliance on subsection 10(2) of the [ATIA] is reasonable and that the confirming or denying of the existence of records is subject to subsections 15(1); … paragraph 16(1)(a), and paragraph 16(1)(c) of the [ATIA]."

[12] The OIC nevertheless concluded that CSIS' reference to PIBs in the Refusal Letter was inappropriate. The OIC noted that PIBs are properly referred to in responses to requests made under the *Privacy Act*, RSC 1985, c P-21 [PA], not under the ATIA. As of November 2015, CSIS no longer refers to PIBs in responses to requests made under the ATIA. The OIC therefore concluded that the complaint in file number 3214-00850 was well-founded and resolved.

[13] On February 15, 2019, after Mr. Russell had commenced this application for judicial review, the OIC issued its Report of Findings regarding file number 3214-00851 [851 Report]. The OIC found that CSIS had failed to conduct a reasonable search in response to Mr. Russell's request. As a result of the OIC's intervention, CSIS renewed its search and provided additional documents to Mr. Russell on January 18, 2019. The OIC therefore considered the complaint to be well-founded and resolved.

III. Procedural History

[14] On November 9, 2018, the Attorney General of Canada requested, among other things, that this matter be heard by a designated judge pursuant to s 52 of the ATIA, and that the

Attorney General be permitted to file a secret supplementary affidavit and confidential submissions. Justice Richard Mosley granted these requests on November 27, 2018. The Attorney General filed the secret supplemental affidavit and confidential submissions on December 7, 2018.

[15] The Attorney General filed a public affidavit on December 27, 2018. The affidavit explained the manner in which CSIS had conducted its searches in response to Mr. Russell's access request. Mr. Russell says this was the first time he learned that the OIC had divided his complaint into two, had assigned different file numbers to the complaints, and had investigated them separately. He appears to have been unaware that the investigation in file number 3214-00851 was still ongoing.

[16] On February 7, 2019, the Attorney General filed a motion in writing to adjourn these proceedings *sine die* pending the OIC's issuance of the 851 Report. As previously mentioned, the OIC issued the 851 Report one week later, on February 15, 2019, concluding that Mr. Russell's complaint was well-founded and resolved. The Attorney General withdrew his motion for an adjournment on March 6, 2019.

[17] Mr. Russell filed a requisition for a hearing on May 1, 2019. Counsel for the Attorney General did not request an opportunity to make oral representations *ex parte,* as contemplated by s 52(3) of the ATIA, but indicated the dates of their availability if the Court considered an *ex parte* hearing to be necessary. Given Mr. Russell's concern about delay in the proceedings, and in light of the clear and unambiguous evidence contained in the secret affidavit, I concluded that

an *ex parte* hearing was not required. The application was set down for hearing by videoconference on July 23, 2019.

IV. Issues

[18] This application for judicial review raises the following issues:

A. What is the scope of the application for judicial review?

B. Was the refusal to confirm or deny the existence of pertinent documents in CSIS PPU 045 appropriate?

V. Analysis

A. *What is the scope of the application for judicial review?*

[19] Section 41 of the ATIA provides as follows:

Review by Federal Court	**Révision par la Cour fédérale**
41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported	**41** La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus

to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[20] It is clear from this provision that an application for judicial review may be brought in this Court only if a complaint has been made to the OIC, and only after the OIC has issued a report of its investigation. Mr. Russell commenced this application for judicial review on September 13, 2018 in respect of the 850 Report. The OIC did not issue the 851 Report until February 15, 2019.

[21] While Mr. Russell says he was unaware that the OIC had divided his complaint into two and investigated them separately until he read the Attorney General's public affidavit filed on December 27, 2018, the fact remains that he never commenced an application for judicial review in respect of the 851 Report. This Court therefore lacks jurisdiction to engage in judicial review of that report (*Defence Construction Canada v Ucanu Manufacturing Corp*, 2017 FCA 133 at para 32; *Westerhaug v Canadian Security Intelligence Service*, 2009 FC 321 [*Westerhaug*] at para 5).

[22] I note that the documents described in the 851 Report were ultimately provided to Mr. Russell with redactions that predominantly protect the identities of CSIS employees. It is evident that Mr. Russell's primary concern is CSIS' refusal to confirm or deny the existence of pertinent documents in CSIS PPU 045.

B. *Was the refusal to confirm or deny the existence of pertinent documents in CSIS PPU 045 appropriate?*

[23] The ATIA and the PA are intended to be a "seamless code", construed harmoniously according to a "parallel interpretation model" (*Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 68). Principles developed in jurisprudence under the ATIA and PA are therefore relevant to the interpretation and application of both statutes (*VB v Canada (Attorney General)*, 2018 FC 394 [*VB*] at para 44).

[24] Judicial review of a government institution's refusal to disclose information is a two-step process. The first step requires the Court to consider if the requested information, whether actual or hypothetical, falls within the provisions that are relied upon. The second step requires the Court to consider the government's exercise of its discretion not to disclose the requested information. The first step is reviewed against the standard of correctness, while the second step is reviewed against the standard of reasonableness (*Braunschweig v Canada (Public Safety)*, 2014 FC 218 [*Braunschweig*] at para 29; *Llewellyn v Canadian Security Intelligence Service*, 2014 FC 432 [*Llewellyn*] at para 23).

[25] The ATIA permits government institutions to refuse requests for records where the records do not exist (s 10(1)(a)), or the requests for actual or hypothetical records are refused pursuant to specific provisions of the ATIA (s 10(1)(b)). Subsection 10(2) permits government institutions that refuse a request for records under s 10(1) of the ATIA not to reveal whether a record in fact exists.

[26] The Federal Court of Appeal has confirmed that CSIS may refuse access to records in accordance with a blanket policy of not disclosing the existence of requested records where "the mere revealing of the existence or non-existence of information is in itself an act of disclosure: a disclosure that the requesting individual is or is not the subject of an investigation" (*Ruby v Canada (Solicitor General)*, [2000] 3 FC 589 (FCA) at paras 65-66, rev'd on other grounds, 2002 SCC 75). Numerous decisions of this Court stand for the same proposition (see *VB* at para 43; *Braunschweig* at paras 45-46; *Llewellyn* at para 37; *Westerhaug* at paras 16-21; and *Cemerlic v Canada (Solicitor General)*, 2003 FCT 133 (FC) at paras 44-45).

[27] The Attorney General says this case is indistinguishable from Justice Patrick Gleeson's recent decision in *VB*. Like Mr. Russell, VB made a request to CSIS under the ATIA for records pertaining to himself. CSIS refused to confirm or deny the existence of records in CSIS PPU 045, citing ss 15(1) or 16(1)(a) and 16(1)(c). Justice Gleeson upheld CSIS's response to VB's request, and observed that "[t]he response the applicant received to the request for investigative records was … the response every Canadian or permanent resident would receive" (*VB* at para 48).

[28] I agree with the Attorney General that the law governing this application is the same as that applied by Justice Gleeson in *VB*. However, in this case Mr. Russell alleges that he and his family have been subject to a coordinated and illegal campaign of persecution by CSIS and other government actors, both foreign and domestic. VB made no similar allegation. He simply wanted to know whether CSIS had any records that pertained to him.

[29] In his submissions to this Court, Mr. Russell recounts numerous incidents that he describes as "a wide mix of threats, harassment, intrusive surveillance, cyber-bullying, stalking, etc." These include:

(a) vehicles driven into his home and directly at him;

(b) shots fired at one of his sons;

(c) his daughter threatened and physically manhandled;

(d) his eldest son and spouse nearly driven off the road;

(e) his computer going haywire;

(f) repeated silent telephone calls;

(g) his home overtly staked-out by hoods; and

(h) overt stalking.

[30] The ATIA exemptions invoked by CSIS in this case are available only if the actual or hypothetical records in question contain:

(a) information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or

associated with Canada or the detection, prevention, or suppression of subversive or hostile activities (s 15(1));

(b) information obtained or prepared in the course of lawful investigations pertaining to activities suspected of constituting threats to the security of Canada (s 16(1)(a)(iii)); or

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including information that relates to the existence or nature of a particular investigation, that would reveal the identity of a confidential source of information, or that was obtained or prepared in the course of an investigation (s 16(1)(c)).

[31] Having reviewed the public and secret evidence filed by CSIS in this application, I am satisfied that the actual or hypothetical records in question were correctly found by CSIS to be exempt from disclosure. This is a significant finding, because records would not be exempt from disclosure if they revealed CSIS' complicity in a coordinated and illegal campaign of persecution against Mr. Russell and his family. Pursuant to ss 15(1) and 16(1)(a) and (c), CSIS may refuse disclosure of information contained in CSIS PPU 045 only if the actual or hypothetical information pertains to a valid exercise of CSIS's statutory mandate to investigate and prevent threats to Canada's national security, national defence, or international relations.

[32] In making this finding, I am neither confirming nor denying the existence of records in CSIS PPU 045 that may pertain to Mr. Russell. I am simply stating that, by operation of law, CSIS may refuse to confirm or deny access to records only if they pertain to a valid exercise of CSIS' statutory mandate. I am satisfied that CSIS' decision to apply the exemptions in this case was reasonable.

[33] While this may not give Mr. Russell complete satisfaction, he may rest assured that this Court has seen no evidence of a coordinated and illegal campaign of persecution by CSIS and other government actors, both foreign and domestic, against him and his family.

VI. Costs

[34] The awarding of costs is discretionary and will ordinarily follow the event, provided the proceeding does not raise an important new principle in relation to the statute (ATIA, s 53(1) and (2)). While the Attorney General has been successful in this application and no new principle has been raised, I am not persuaded that costs should be granted.

[35] The OIC divided Mr. Russell's complaints into two separate investigations, but appears not to have told him. There was excessive delay in completing the investigations, both of which found Mr. Russell's complaints to be well-founded in part. Given the Attorney General's position that the 851 Report could not form a part of this proceeding, the motion to adjourn the application *sine die* pending the issuance of that report was unnecessary and unduly complicated the conduct of the case.

VII. Conclusion

[36] The application for judicial review is dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1656-18
STYLE OF CAUSE:	RODERICK THOMAS MCCULLOCH RUSSELL v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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