

Federal Court



Cour fédérale

Date: 20210318

Docket: T-1681-19

Citation: 2021 FC 234

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 18, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CECILIA CONSTANTINESCU

Applicant

and

CORRECTIONAL SERVICE CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for review under section 41 of the *Privacy Act*, RSC 1985, c P-21, in which Cecilia Constantinescu asks this Court to order Correctional Service Canada [CSC] to disclose the information covered by her access to information request dated August 14, 2017,

and bearing the number P-2017-02487 [Access Request] and to order the payment of damages and interest.

[2] For the reasons that follow, I am dismissing the application for review.

II. Facts and proceedings

[3] The facts underlying this case are set out in greater detail in *Constantinescu v Canada (Correctional Service)*, 2021 FC 229 [*Constantinescu* 1].

[4] In short, Ms. Constantinescu was a CSC recruit taking the Correctional Training Program [CTP] in the fall of 2014 at the CSC Staff College in Laval, Quebec, in order to become a corrections officer.

[5] In October 2015, Ms. Constantinescu filed a complaint with the Canadian Human Rights Commission [CHRC] based on allegations of assault, harassment, bullying and abuse suffered during the CTP.

[6] While the matter was before the CHRC, it proposed that the parties attempt to settle their dispute through mediation. For reasons irrelevant to this application for review, the mediation was unsuccessful.

[7] The CHRC recommended that Ms. Constantinescu's complaint be rejected, but nevertheless referred her file to the Canadian Human Rights Tribunal [CHRT] for an inquiry on May 31, 2017.

[8] On August 14, 2017, CSC received the following Access Request from Ms. Constantinescu:

[TRANSLATION]

Please provide me with the complete and unredacted correspondence between Correctional Service Canada and the Canadian Human Rights Commission regarding the mediation proposed by the Commission in my complaint file, through CHRC mediator [name of individual].

Please also provide all records produced by Correctional Service Canada authorizing [name of individual], Director of the CSC Staff College in Laval, against whom I filed a complaint of abuse in September 2015, and [name of individual], Director of the Implementation of Learning Programs Division, to participate in this mediation session.

[9] On August 28, 2017, CSC confirmed receipt of the Access Request.

[10] On November 2, 2017, having received no response to her Access Request, Ms. Constantinescu filed a complaint with the Office of the Privacy Commissioner [OPC] for the refusal to disclose the personal information covered by the Access Request [Complaint]. The OPC acknowledged receipt of the Complaint on November 27, 2017.

[11] Ms. Constantinescu continued with her [TRANSLATION] "relentless and tortuous efforts", not only requesting that CSC disclose records relating to the Access Request, but also cc'ing

several Canadian Members of Parliament as a sign of protest. According to the evidence filed by Ms. Constantinescu herself, it also appears that between 2015 and 2018, she made at least 16 additional access to information requests from different angles relating to the incident that is the subject of the complaint before the CHRT, either under the *Privacy Act* or under the *Access to Information Act*, RSC 1985, c A-1 [ATIA].

[12] It would appear that CSC initially identified about 120 records likely to be covered by Ms. Constantinescu's Access Request.

[13] On May 1, 2018, CSC provided Ms. Constantinescu with 29 pages of records containing the information covered by the Access Request. Portions of the records were redacted pursuant to section 26 of the *Privacy Act* (Information about another individual). In addition, CSC identified 11 records as irrelevant to the Access Request, and also notified Ms. Constantinescu that approximately 70 pages' worth of the information covered was not included in the disclosure, as it was the subject of a consultation, and that [TRANSLATION] "following the response to this consultation, [Ms. Constantinescu will be] notified in accordance with the response received". It appears that nine records were missing from the disclosure package.

[14] These 29 pages were received by Ms. Constantinescu on May 4, 2018; she did not file a complaint with the Office of the Information Commissioner with respect to the redacted portions of these records.

[15] On July 31, 2018, following several exchanges between CSC and Ms. Constantinescu, CSC stated that it should be able to complete the disclosure of the personal information relating to the Access Request by late August 2018. That did not turn out to be the case.

[16] In response to a follow-up message from Ms. Constantinescu, the OPC contacted her on November 2, 2018, acknowledging CSC's lateness and undertaking to follow up with the government institution in the subsequent months.

[17] On August 26, 2019, the OPC held that CSC had not met its legislative timeframes and had not responded to the Access Request. Accordingly, the OPC concluded that Ms. Constantinescu's Complaint was well founded. The OPC limited itself to the issue of the lateness of the disclosure of the records in response to the Access Request.

[18] On October 15, 2019, Ms. Constantinescu filed this application for review against the CSC decision refusing to disclose the personal information requested.

[19] On December 4, 2019, of the 70 or so pages of records withheld for consultation, CSC sent Ms. Constantinescu 54 additional pages of records covered by the Access Request. Most of these pages, or portions thereof, were redacted or severed pursuant to section 27 of the *Privacy Act* (Privilege and Professional Secrecy). In addition, 16 pages were identified as duplicates.

[20] Ms. Constantinescu did not file a complaint with the OPC with respect to the redacted or severed portions of the records.

[21] On January 10, 2020, CSC sent Ms. Constantinescu additional information, namely, the nine pages missing from the records sent on May 1, 2018. Some of the information was redacted in whole or in part in accordance with section 26 of the *Privacy Act*. Accordingly, the approximately 120 records initially identified by CSC as potentially relevant to Ms. Constantinescu's request were taken into account.

[22] Ms. Constantinescu raises the following objection: the nine records disclosed to her on January 10, 2020, were completely unrelated to her complaint. These nine records were those missing from the disclosure of May 1, 2018. In any event, once again, whether I interpret the Access Request broadly or narrowly, I do not understand the basis for the objection, given that Ms. Constantinescu may have received even more information than that to which she was entitled.

[23] Ms. Constantinescu sees things differently. She claims that the issue is not whether she obtained records she should not have received, but rather whether records that do concretely meet the criteria of her Access Request were withheld and replaced by irrelevant records. Again, I am afraid that I cannot accept this interpretation.

[24] According to the respondent, this complementary disclosure constitutes a full response to the Access Request in that all of the personal information covered by it has allegedly been disclosed. Once again, Ms. Constantinescu did not file a complaint with the OPC regarding the records or the redacted or severed portions thereof.

III. Issues

[25] The two following issues are raised in this proceeding:

1. Is this application for review moot?
2. Is this application for review premature?

IV. Discussion

[26] As a preliminary issue, the respondent submits that paragraphs 1, 2, 26 and 35 to 37 of Ms. Constantinescu's affidavit either set out opinions or facts that are unsupported by the evidence or irrelevant to this proceeding, or constitute arguments. The respondent therefore asks that this Court disregard those paragraphs for the purposes of this proceeding.

[27] I accept the respondent's arguments for the most part. Most of the facts and opinions set out in those paragraphs by Ms. Constantinescu, while they do lend a certain colour to the file, are not necessary to the resolution of this matter. I have therefore not taken them into account in considering the issues, except perhaps in the presentation of the facts in order to put the issues in context.

[28] The Federal Court's review power in this case is derived from section 41 of the *Privacy Act*:

**Review by Federal Court
where access refused**

41 Any individual who has been refused access to personal information requested under subsection

**Révision par la Cour
fédérale dans les cas de refus
de communication**

41 L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du

<p>12(1) may, if a complaint has been made to the Privacy 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 Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.</p>	<p>paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.</p>
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[29] As indicated above, this application for review was filed on October 15, 2019. The focus of the application was clearly the fact that CSC had failed to produce records in response to the Access Request within the timeframes set out in the *Privacy Act*.

[30] That said, when this application for review was heard, the initial grounds raised in support of the application were no longer relevant in light of how the situation had progressed. The grounds for the application for review were set out in the affidavit Ms. Constantinescu had filed in support of her application, and no objection was raised regarding the fact that some of the 29 records given to Ms. Constantinescu on May 1, 2018, had been redacted. The application for review focused on the fact that most of the records were still subject to consultation as of May 1, 2018, that no other record had been received since and that the OPC had upheld the Complaint as well founded.

[31] On February 14, 2020, Ms. Constantinescu sent a letter to the Court in which she made an informal request to file an amended affidavit. In her letter, she indicated that she had received additional records from CSC on December 4, 2019, and January 10, 2020, regarding the Access Request at issue. She did not comment on the exemptions to the disclosure of personal information claimed by CSC when it disclosed the records to Ms. Constantinescu.

[32] CSC had no objections, so on February 27, 2020, this Court issued an order that, among other things, allowed Ms. Constantinescu to file an amended affidavit and extended the deadline for filing her record. Ms. Constantinescu filed her record on March 19, 2020, which included her amended affidavit and her memorandum of fact and law.

[33] Ms. Constantinescu clearly states the following in her amended affidavit and memorandum:

[TRANSLATION]

The purpose of this application for judicial review is to ask this Court to review all of the records that have been excluded or redacted by Correctional Service Canada from the access request file and to allow me to have access to the ones I am entitled to see under the *Privacy Act*, the Office of the Privacy Commissioner process manual and other Canadian legislation.

[34] The grounds for this application for review have never been amended, and while Ms. Constantinescu raises the issue of CSC's late disclosure of information in both her amended affidavit and her memorandum, it is clear from these two documents that Ms. Constantinescu's objection is based no longer on CSC's refusal to disclose the records in response to her Access

Request, but rather on the fact that several records are redacted and some records have not been disclosed at all because of exemptions under the *Privacy Act*.

[35] Ms. Constantinescu is self-represented, and this Court has regularly expressed the need to grant a degree of flexibility to litigants who do not have legal counsel, but this does not extend as far as completely disregarding our Court's rules (*Curtis v Canada (Canadian Human Rights Commission)*, 2020 FCA 149 at para 31). Ms. Constantinescu has never attempted to amend the grounds of her application for review, unless I am to interpret her request to file an amended affidavit, in the absence of any other mention of an amendment to the conclusions she is seeking from this Court, as an amendment of the application for review. In any case, I do not believe it matters either way, as the outcome will ultimately be the same.

[36] The respondent is challenging the application for review on two fronts. First, it submits that the application is moot because CSC responded to the Access Request by disclosing to Ms. Constantinescu all of the personal information requested in the transfers of May 1, 2018, December 4, 2019, and January 10, 2020. In addition, it submits that the application is premature, because the Commissioner has not filed an investigation report with respect to the disclosure.

[37] Before me, Ms. Constantinescu has presented several arguments.

[38] First, Ms. Constantinescu states that some of the records she received from CSC related to another mediation supposedly held at a different time, and were therefore not relevant to her request. She also states that several records were not disclosed by CSC.

[39] Ms. Constantinescu also invites me to examine the 11 pages characterized as irrelevant to her request and the 16 pages of duplicates to determine whether CSC is hiding anything. I do not believe it is open to the Court to take this step in the absence of a basis for believing that CSC's statements are inadequate: no such objection was made to the OPC or in the arguments before me.

[40] Ms. Constantinescu points to an email dated November 20, 2015, which shows that the Director of CSC's Incidents Investigations Branch [Director] was in contact with the mediator regarding the reason for which Ms. Constantinescu did not wish to meet with the Director during the mediation process. Ms. Constantinescu submits that this email confirms that other exchanges took place between the Director and the mediator that were not disclosed.

[41] From my point of view, all this email says is that the Director was in contact with the mediator—which could have happened by telephone—regarding Ms. Constantinescu's refusal to meet with her during the mediation process. Such a communication would of course be understandable. I am of the view that this email in no way constitutes evidence that other written exchanges took place between the Director and the mediator. I see this as the perspective of a suspicious mind. With no other element supporting such claims, I do not see how the Court can intervene and order the disclosure of additional records (see *Constantinescu* 1).

[42] Ms. Constantinescu states that the sole emails disclosed were those exchanged between CSC employees; the emails exchanged with the mediator were not disclosed. Accordingly, she argues that because emails must have been exchanged with the mediator in response to her request, CSC must be hiding them.

[43] I think we must return to the Access Request itself. Ms. Constantinescu requested all records produced by CSC authorizing the Director and another person to participate in this mediation session. It appears to me that most if not all of the exchanges relating to this Access Request are internal to CSC and could well not involve the mediator, beyond perhaps a potential telephone call or conversation. Therefore, Ms. Constantinescu has failed to persuade me that her point of view on this issue is correct.

[44] Ms. Constantinescu states that she should have received the exchanges confirming the cancellation of the mediation. However, these were not covered by her Access Request.

[45] Ms. Constantinescu submits that the Director's participation in the mediation required a more formal process and that she would have liked to have seen a memorandum, a directive or an exchange of emails confirming that the Director would be participating in the mediation. Ms. Constantinescu may be right, but it is equally possible that she is not, and that the decision to have the Director participate was made simply because she was the most familiar with the matter and that the decision was reached during meetings. I am not convinced that CSC has failed to produce all of the exchanges covered by Ms. Constantinescu's request.

[46] To the extent that Ms. Constantinescu is now expressing her dissatisfaction with what was disclosed to her and claiming that records have been withheld, I must agree with the respondent that this argument was not put forward in the course of the proceedings.

[47] Ms. Constantinescu is asking for a [TRANSLATION] “full review of the entire matter”, including the refusal to disclose records, the late disclosure of records, the disclosure of redacted records and records not disclosed on the basis of an exemption claimed by CSC. However, Ms. Constantinescu may not go beyond the arguments raised with respect to the disclosure in her notice of application, her affidavits and her memorandum when appearing before the Court. As stated above, the grounds for the application for review refer to the issue raised in the Complaint, namely, the alleged refusal to disclose records.

[48] The amended affidavit and the memorandum filed by Ms. Constantinescu address issues of redaction of the disclosed records. Before me, Ms. Constantinescu is now submitting a position to the effect that records have been withheld. I fear that Ms. Constantinescu must not understand that, with few exceptions, according to the rules of procedure, a party may not raise at the hearing arguments that have not been made in writing: this is to avoid taking the other party by surprise. I will therefore not hear any arguments relating to the potential withholding of records.

[49] Ms. Constantinescu draws the Courts attention to the first page of a letter, initially subject to consultation, but later included in the disclosure of December 4, 2019, and states that the second page of this letter is missing. It is true that it appears that there should be a second page,

at least containing the signature of the sender, but this point was never raised prior to the hearing before me.

[50] Ms. Constantinescu notes that the records are not organized in chronological order, which indicates that records have been exchanged, that records that were relevant to her request were replaced by irrelevant records. Once again, although suspicions of a conspiracy are central to this proceeding, I am still not convinced.

[51] Ms. Constantinescu also points out another email between two CSC employees, the content of which is redacted, and challenges this redaction, which is based on solicitor-client privilege. Again, this issue was never raised in a complaint to the OPC, which would be in the best position to consider it. In any case, I note that one of CSC's counsel received a copy of it.

[52] Moreover, the issue of whether the disclosed records were relevant to her Access Request is debatable: is Ms. Constantinescu's Access Request to be interpreted broadly or narrowly? However, it appears to me that if Ms. Constantinescu received more records than those to which she was entitled under her Access Request, she has no grounds for complaint.

[53] The mere suspicion that some records are missing is not very useful in the absence of reasonable arguments or evidence supporting this suspicion, especially when it is not specifically mentioned in the applicant's written submissions.

[54] I will therefore limit my assessment of this case to the issues raised above.

[55] While she does raise lateness of disclosure in support of what appears to be an application for damages and interest, Ms. Constantinescu essentially appears to be inviting the Court to rule on the exemptions claimed by CSC to justify the redaction of certain pages and the exclusion of certain records. At the very least, the Federal Court of Appeal has clearly established that the remedy of damages and interest falls outside of this Court's jurisdiction in the context of the review provided for by section 41 of the *Privacy Act* (*Connolly v Canada Post Corp.*, [2000] FCJ No. 1883 at para 10).

[56] First, if I must analyze this application on the basis of CSC's refusal to disclose the records covered by the Access Request, I am forced to dismiss it for mootness. CSC has now completed the disclosure of records in response to the request.

[57] In *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 [*Statham*], the Federal Court of Appeal listed the three conditions to be met before an access requester may apply to the Federal Court for review under section 41 of the ATIA: the applicant must have been refused access to a requested record and have complained to the Commissioner about the refusal, and the Commissioner must have issued a report on the findings of its investigation (*Statham* at para 64). While that case involved the ATIA, according to the case law, that statute and the *Privacy Act* are to be construed harmoniously according to a "parallel interpretation model" (*Cumming v Canada (Royal Canadian Mounted Police)*, 2020 FC 271 at para 30; *Edw. Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 68).

[58] What is clear from the case law is that an application for review is rendered moot if all of the records covered by the Access Request are disclosed, without any exemptions being claimed by the government institution, prior to the hearing before the Federal Court (*X v Canada (Minister of National Defence)* (1991), 41 FTR 73; *Statham*). The same principle is at play where a government institution has, in disclosing all the records, redacted parts of the records, but the redacted portions have also been disclosed prior to the hearing (*Frezza v Canada (National Defence)*, 2014 FC 32, 445 FTR 299).

[59] If I must review this application on the basis of the exemptions claimed by CSC, I must also dismiss it. An application for review is premature if it is presented before the Office of the Information Commissioner has reported on the findings of its investigation into the exemptions and redactions (*Canada (Public Safety and Emergency Preparedness) v Gregory*, 2021 FCA 33 at para 13 [*Gregory*]; *Whitty v Canada (Attorney General)*, 2014 FCA 30 at para 8 [*Whitty*]).

[60] The Federal Court of Appeal observed the following in *Blank v Canada (Justice)*, 2016 FCA 189:

[30] The case law has made it abundantly clear that a complaint to and a report from the Commissioner is a prerequisite before the Federal Court can rule upon the application of any exemption or exclusion claimed under the Act: see *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522, 240 N.R. 244, at para. 27; *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315, [2012] 2 F.C.R. 421, at para. 55. As stated by my colleague Justice Stratas in *Whitty v. Canada (Attorney General)*, 2014 FCA 30, 460 N.R. 372, at para. 8, this requirement is a statutory expression of the common law doctrine that all adequate and alternative remedies must be pursued before resorting to an application for judicial review, barring exceptional circumstances.

...

[36] Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act.

[61] In *Sheldon v Canada (Health)*, 2015 FC 1385 at paragraphs 21 to 25, LeBlanc J. writes:

[21] The Applicant claims that the review proceeding is not moot since Health Canada only partially responded to the Access Request by disclosing a redacted version of the requested records. She says that she is entitled to a full version of these records and that the review proceeding seeks an order to that effect. However, the case law makes it clear that absent a prior investigation on the part of the ICC as to the manner in which Health Canada responded to the Access Request, it is not open to the Court to review the nature and content of the response, however imperfect and incomplete the response may appear to be to the access requester (*Statham*, above, at paras 23-24, 28-30; *Dagg v Canada (Minister of Industry)*, 2010 FCA 316, at para 13 [*Dagg*]; *Information Commissioner of Canada*, above at para 47).

[22] According to the mechanics of the regime established by the Act, the Applicant's demand for an order enjoining Health Canada to disclose an unredacted version of the requested records is therefore premature. In a review proceeding initiated under section 41 of the Act on the basis of a complaint of a deemed refusal, the Court cannot rule upon the application of any exemption or exclusion claimed under the Act if the Commissioner has not investigated and reported on the claim to the exemption or exclusion (*Statham*, above at para 55; *Whitty*, above, at paras 8 and 9, *Lukács v Natural Sciences and Engineering Research Council of Canada*), 2015 FC 267, at para 31).

[23] Here, the ICC limited her investigation, as she was bound to do given the nature of the Applicant's complaint, to requiring Health Canada to respond to the Access Request so that the Applicant could then consider the merits of whatever response was provided. If not satisfied with the response, the Applicant was in turn entitled to make a further complaint to the ICC, as she appears to have done, so that the ICC could consider the merits of any exemptions or exclusions claimed under the Act by Health Canada. As previously indicated, I have no evidence before me that this further complaint has been investigated and reported on by the

ICC. At the hearing, the Applicant could not confirm the status of this complaint.

[24] Therefore, I have no choice but to find that the third prerequisite that the Applicant had to satisfy before applying to the Court under section 41 of the Act regarding the exemptions and exclusions applied by Health Canada to the requested records, that is the issuance of a report from the ICC, has not been met (*Statham*, above at para 64). The Applicant's challenge to Health Canada's decision not to disclose the "full" record is therefore premature. This is the logic of the scheme established by the Act, however imperfect and burdensome it may be perceived to be by some.

[25] The Applicant's review proceeding is therefore either moot or premature and for these reasons, ought to be dismissed.

[62] The Federal Court of Appeal recently stated unequivocally and yet again that there must be a report from the Commissioner on the validity of the exemptions before this Court may order a disclosure (*Gregory* at para 13).

V. Conclusion

[63] Ms. Constantinescu knew that CSC was claiming exemptions after she received the first bundle of records on May 1, 2018, but she did not file a complaint about this with the OPC until after it had issued its report. The fact that the OPC report mentioned only CSC's lateness in disclosing the records was logical, as it was the sole basis for Ms. Constantinescu's complaint at that time. The Court cannot, in the circumstances, be asked to rule on CSC's exemption claims. Because Ms. Constantinescu's application is premature on that ground, I must dismiss it for that reason as well.

[64] In any event, Ms. Constantinescu's application is also without effect.

[65] Accordingly, this application for review will be dismissed with costs in the amount of \$500 payable to CSC.

JUDGMENT in T-1681-19

THIS COURT'S JUDGMENT is that the application for review is dismissed, with costs awarded to the respondent in the amount of \$500, payable by the applicant.

“Peter G. Pamel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1681-19

STYLE OF CAUSE: CECILIA CONSTANTINESCU v CORRECTIONAL SERVICE CANADA

PLACE OF HEARING: MATTER HEARD BY VIDEOCONFERENCE IN MONTRÉAL, QUEBEC

DATE OF HEARING: OCTOBER 15, 2020

JUDGMENT AND REASONS: PAMEL J.

DATED: MARCH 18, 2021

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(ON HER OWN BEHALF)

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