

Federal Court



Cour fédérale

**Date: 20210830**

**Docket: T-437-20**

**Citation: 2021 FC 896**

**Ottawa, Ontario, August 30, 2021**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**PATRICIA L SCHOENDORFER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Patricia L Schoendorfer, who is self-represented, seeks judicial review under section 41 of the *Access to Information Act*, RSC 1985 c A-1 (the *ATIA*) of a decision by the Royal Canadian Mounted Police (RCMP) on June 19, 2019 (the Decision).

[2] The Decision responded to the Applicant's second access to information request concerning a police report about her deceased son, Kyle Harold Steven Schoendorfer, who died by suicide.

[3] Of the 131 pages of responsive records, the RCMP disclosed 12 pages. One page was fully disclosed and 11 were partially disclosed. The balance of the requested records totalled 119 pages of which 12 were withheld as being "not relevant" and 107 pages were not disclosed on the basis that they fell within the exemption in subparagraph 16(1)(a)(ii) of the *ATIA* which is hereafter referred to simply as subparagraph 16(1)(a)(ii).

[4] In the partially disclosed records, the RCMP exercised their discretion to withhold certain information pursuant to subparagraph 16(1)(a)(ii). Six pages of the partially disclosed records were heavily redacted.

[5] The Applicant seeks an order releasing the police report. The Respondent asks that the application be dismissed with costs.

[6] In her Notice of Application the Applicant's grounds for review are stated as:

The grounds for the application are: confirmation on what happened that night and what happened to my son. I have not been told the whole story and it is weighing heavy on my heart.

[7] I am highly sympathetic to the Applicant's expressed grief and frustration from not receiving full disclosure of the requested records. However, for the reasons that follow, I must dismiss the application as my *de novo* review satisfies me that the *ATIA* provisions were correctly applied.

[8] I am also satisfied that the RCMP reasonably exercised their discretion in response to a request from the Office of the Information Commissioner (OIC) to reconsider the matter.

## II. The Access to Information Requests

[9] On December 27, 2018, the Applicant submitted an access to information request stating:

File No. 2018-1857637

Grand Prairie AB, RCMP Detachment

Would like all information of this investigation including written material, pictures and any other information pertaining to this. This file pertains to Kyle Harold Steven Schoendorfer.

This includes vehicles involved + his death investigation. I want anything and everything relating to this.

[10] The initial response to the request, made on February 1, 2019, was that the file requested pertained to an active investigation and was entirely subject to exemption under subparagraph 16(1)(a)(i) of the *ATIA*. The Applicant was advised that once the investigation and any related court proceedings were concluded she could resubmit her request.

[11] On April 29, 2019, the Applicant submitted a second ATIP request, which is the subject of this review. She simply requested “File 2018-1856737 from Grand Prairie, AB RCMP Detachment.”

[12] On June 12, 2019, an analyst at the Access to Information and Privacy Branch of the RCMP (the analyst), made a recommendation to the RCMP that the requested records be withheld pursuant to subparagraph 16(1)(a)(ii) as they were part of a lawful RCMP investigation that was less than 20 years old.

[13] The analyst also recommended the release to the Applicant of some information on the basis that: (1) it was already known to her as the next of kin or, (2) she had already received it from the local police detachment. The recommendations of the analyst were accepted by the RCMP.

[14] On June 19, 2019, the Applicant was provided with the Decision. It was composed of a response letter and a release package. The letter advised the Applicant that portions of the records released were exempt “pursuant to subparagraph 16(1)(a)(ii) of the Act”. One full page and 11 partially disclosed pages were enclosed with the letter.

### III. **The Complaint to and Investigation by the Information Commissioner**

[15] On August 7, 2019, the Applicant complained to the OIC that the RCMP had improperly applied exemptions under the *ATIA*.

[16] On August 26, 2019, the RCMP was advised by the OIC that the Applicant had filed the complaint. A copy of the complaint was provided to the RCMP for response. In addition, the OIC asked the RCMP to reconsider their exercise of discretion in the Applicant’s case.

[17] The basis of the complaint was summarized by the OIC to be that “the RCMP had improperly applied exemptions, so as to unjustifiably deny access to records, or portions thereof”.

[18] The RCMP reviewed the Applicant’s file and determined that the access request did not meet the requirements for compassionate disclosure.

[19] On November 7, 2019, the OIC requested the RCMP provide more details of the reason behind the decision to exempt the portions they did and to re-examine their application of subparagraph 16(1)(a)(ii). Specifically, on the basis that the complaint could meet the requirements of compassionate disclosure, the OIC asked the RCMP to look again at whether their discretion was reasonably exercised.

[20] On November 13, 2019, the RCMP agreed to take another look at the file, as requested.

[21] On January 7, 2020, the RCMP confirmed they had taken another look at the file and based on the circumstances, found that the file did not meet the requirements of compassionate disclosure.

[22] On January 31, 2020, the OIC provided its final report to the Applicant stating that they were satisfied the RCMP had met their obligation under the *ATIA*. The OIC indicated that the request to the RCMP to reconsider was made “with a view to determin[ing] whether there may be a broader interest in disclosure of a deceased individual’s personal information to a close relative in order to facilitate an understanding of the circumstances of a loved one’s death.”

[23] The OIC advised the Applicant that the RCMP ultimately maintained that the *ATIA* and the *Privacy Act* warranted the information at issue being withheld. The OIC opined that based on the current legislation and the *Privacy Act*, the RCMP was justified in refusing to disclose the information withheld under subparagraph 16(1)(ii)(a).

[24] The OIC considered the Applicant’s complaint to be not well founded. It advised that the investigation on the complaint would be concluded.

[25] The record shows the complaint was completed and marked closed on February 4, 2020.

IV. **Preliminary Matter**

[26] The Respondent argues that the Applicant provided additional facts in paragraphs 3-4 of her Memorandum of Fact and Law regarding her relationship with her son's ex-girlfriend and addressing the possibility of her using the sought information maliciously or in a legal action against the ex-girlfriend.

[27] The Applicant's affidavit responds to two of the reasons set out in the affidavit of the analyst filed in this application. They are factors that were considered by the analyst in exercising her discretion not to disclose certain documents. Those factors are set out and considered in more detail later in these reasons.

[28] The Applicant stated in her affidavit that she is not the malicious party and that the limitation period for legal action would expire on December 16, 2020.

[29] The Respondent argues these paragraphs constitute new evidence and should not be accepted by the Court. They submit that neither point is relevant to whether the withheld materials could be used maliciously.

[30] I agree that these paragraphs are new evidence that was not before the RCMP and therefore, are not appropriate to be considered in this application. They do not meet any of the exceptions set out in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 16.

[31] I find that neither of the paragraphs are relevant to the issue at the heart of the matter. The central question is whether the RCMP correctly determined that the requested documents contained information obtained or prepared by an investigative body as specified in the regulations under the *ATIA*, as a result of which those documents were not liable to be produced pursuant to subparagraph 16(1)(ii)(a).

[32] For the foregoing reasons, paragraphs 3 and 4 of the Applicant's affidavit will not be considered.

V. **Confidential Affidavit**

[33] The Applicant made a request pursuant to Rule 317 of the *Federal Courts Rules* seeking a certified copy of material that is not in her possession, but is in the possession of the Respondent.

[34] The Respondent objected to the request on the basis that it was overly broad and would capture the very material the RCMP exercised its discretion to withhold pursuant to the *ATIA*. The Respondent moved to be permitted to file a confidential affidavit with the Court.

[35] Prothonotary Tabib granted the Respondent's motion to file a confidential affidavit.

[36] For the benefit of the Applicant, I note that filing a confidential affidavit is the usual procedure by which these matters are addressed. The unredacted material is submitted in a sealed envelope to the application judge and no one else. It does not leave the physical premises of the Federal Court. The contents of the affidavit remain confidential pending a determination by the Court on the merits of the review application.

[37] If the Applicant were to succeed on the merits, then she would receive an unredacted copy of any documents found to have been improperly withheld from her. If she does not succeed, as I have indicated is the case, then the documents remain unavailable to her until the 20 year time period has expired or, as mentioned by the OIC in their report to the Applicant, the legislation is changed to permit such disclosure.

[38] On July 22, 2020, the Respondent filed their confidential affidavit. Attached as an exhibit to the affidavit, for review by the Court, is the material captured by the Applicant's access to information request in unredacted form. It is all the material withheld from the Applicant.

[39] At the outset of the hearing of this application, the Respondent indicated it would not be necessary to make any submissions in the absence of the Applicant. The Respondent simply pointed the Court to particular paragraphs in the confidential affidavit that they believed would be useful to review.

[40] I confirm that I have carefully reviewed the confidential material several times, both prior to the hearing and in the course of determining this application on the merits.

## VI. **Issues and Standard of Review**

[41] Recently, in *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142, (*Lukács*), Madam Justice Kane succinctly summarized the 'mechanics' of the judicial review of an application brought pursuant to section 41 of the *ATIA*:

The judicial review of decisions made pursuant to section 41 of the Act should be relatively straightforward. As noted above, although the decision of the Information Commissioner triggers the ability of a party to seek judicial review, the Court does not review the



decision of the Information Commissioner; rather it reviews the decision, in this case, of the [RCMP], to release or withhold the records sought. The Court's review will assess whether the records at issue, which must be provided to the Court and kept under seal by the Court, should be disclosed or whether exemptions in the Act apply to permit their non-disclosure and whether the [RCMP] reasonably exercised its discretion to withhold the records.

(Amended only to reflect the RCMP instead of the institution named in *Lukács*.)

*Lukács* at para 44.

A. *Issues*

[42] There are two issues to be determined in this application:

1. Whether the non-disclosure of the records withheld or redacted by the RCMP fall within the exemption claimed under subparagraph 16(1)(ii)(a).

Any records that do not fall within the exemption in subparagraph 16(1)(a)(ii) should be fully disclosed to the Applicant.

2. If any or all of the records do fall within the exemption, the next issue is whether the RCMP reasonably exercised its discretion to redact or withhold the records from the Applicant.

If it is found that the RCMP did not act reasonably, then the pertinent records should be disclosed to the Applicant.

B. *Standard of Review*

[43] Section 44.1 of the *ATIA* specifically states that a proceeding under section 41 of the *ATIA* is to be conducted not as a review, but rather as a new proceeding:

*De novo* review

44.1 For greater certainty, an application under section 41 or 44 is to be heard and

*Révision de novo*

44.1 Il est entendu que les recours prévus aux articles 41

determined as a new proceeding.

et 44 sont entendus et jugés comme une nouvelle affaire.

[44] A *de novo* analysis is one of the examples used by the Supreme Court of Canada as something that is not subject to reasonableness review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para 83.

[45] Statutorily, I am to determine the matter afresh and decide whether or not the exemption in subparagraph 16(1)(a)(ii) applies to the records withheld from the Applicant. That is a correctness review. There are only two possible outcomes: either the records are, or they are not, covered by the exemption.

[46] For discretionary decisions, such as those made by the RCMP in deciding whether or not to release to the Applicant documents or unredacted parts thereof, the standard of review is reasonableness: *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para 31.

[47] A reasonable decision is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* para 85.

## VII. Key Legislative Provisions

[48] Subsection 2(1) of the *ATIA* sets out that the purpose of the *ATIA* is to provide a general right of access to information in records under the control of a government institution, subject to certain necessary exceptions that should be limited and specific.

[49] Section 19(1) of the *ATIA* states that, subject to section 19(2), the head of the institution shall refuse to disclose personal information. (my emphasis). Personal information is defined in section 3 of the *Privacy Act*, RSC 1985, c P-21 as “any information about an identifiable individual that is recorded in any form”.

[50] Consistent with the purpose, subsection 48(1) of the *ATIA* puts the onus on the government institution, here the RCMP, to show that it was authorized to refuse to disclose a record or part of a record it withheld from a requestor when the proceeding is under subsections 41(1) and (2).

[51] Also consistent with the purpose, section 49 of the *ATIA* provides that if the reviewing court determines the government institution refusing to disclose a record or part thereof, was not authorized to refuse then the Court may order disclosure of the record, or part of it, subject to such conditions as it deems appropriate.

VIII. **Did the exemption in subparagraph 16(1)(ii)(a) apply to the non-disclosed records?**

A. *Legislative Authority*

[52] The RCMP relied upon subparagraph 16(1)(a)(ii) for all the exemptions claimed.

[53] Subparagraph 16(1)(a)(ii) states:

**Law enforcement and investigations**

16 (1) The head of a government institution may refuse to disclose any

**Révision *de novo***

16 (1) Le responsable d’une institution fédérale peut refuser la communication de documents :

record requested under this Part that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

[ . . . ]

(ii) the enforcement of any law of Canada or a province, or

[ . . . ]

if the record came into existence less than twenty years prior to the request;

(My emphasis)

a) datés de moins de vingt ans lors de la demande et contenant des renseignements obtenus ou préparés par une institution fédérale, ou par une subdivision d'une institution, qui constitue un organisme d'enquête déterminé par règlement, au cours d'enquêtes licites ayant trait :

[ . . . ]

(ii) aux activités destinées à faire respecter les lois fédérales ou provinciales;

[ . . . ]

(Je souligne)

[54] Based on the legislation, the 20 year period in this matter expires on December 26, 2038 which is the day before the date that is 20 years after the Applicant made her December 27, 2018 access request.

[55] When examining the application of subparagraph 16(1)(a)(ii) to exempt disclosure of the records sought by the Applicant, two components must be met.

[56] First, the institution refusing to disclose the information must be a government institution, or be part of one as specified in the regulations to the *ATIA*.

[57] Secondly, the government institution must have prepared or obtained the information in the course of a lawful investigation pertaining to law enforcement in Canada or a province.

[58] The Respondent has shown that both of these requirements have been met.

[59] The RCMP is a legislative body as specified in section 9 of the *Access to Information Regulations*, SOR/83-507, which states:

**Records relating to investigations, examinations and audits**

9 The investigative bodies for the purpose of paragraph 16(1)(a) of the Act are the investigative bodies set out in Schedule I to these Regulations.

**Organismes d'enquête**

9 Aux fins de l'alinéa 16(1)a) de la Loi, les organismes d'enquête sont ceux énumérés à l'annexe I du présent règlement.

[60] In the same section of the Regulations, under the heading "Schedule I" appears "(Section 9)", which refers to section 9 of the main body of the Regulations. The title "Investigative Bodies" appears next. In a short list of such bodies, item 6 is "Royal Canadian Mounted Police".

[61] This establishes that the RCMP falls within paragraph 16(1)(a) of the *ATIA*.

[62] Being a peace officer in the RCMP includes performing all duties assigned in relation to the preservation of the peace, prevention of crime and of offences against the laws of Canada and the laws in force in any province in which the RCMP is employed: *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, (*RCMP Act*) section 18 "Duties".

[63] The regulations to the *RCMP Act* expand upon the duties to include, amongst others, enforcing all Acts of Parliament and assisting law enforcement agencies in Canada in detecting and investigating criminal activity: *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, sections 14 and 57.

[64] The Respondent submits that the responsive documents pertain to the enforcement of the *Firearms Act*, SC 1995, c 39. I note that one of the partially released pages does refer to the *Firearms Act* directly, as well as several sections of the *Criminal Code*, RSC 1985, c C-46 which reference the *Firearms Act*.

[65] I am satisfied from the legislation and regulations discussed above that the RCMP is a government institution that is an investigative body specified in the regulations. In this instance, it was acting within the parameters stipulated in paragraph 16(1)(a) of the *ATIA*. It was conducting a lawful investigation pertaining to the detection, prevention, or suppression of crime, and the materials were less than 20 years old. In addition, the death of the Applicant's son involved use of a firearm.

[66] Once records fall within paragraph 16(1)(a) of the *ATIA*, the right to refuse access to those records is found in the subparagraph 16(1)(a)(ii) which was set out above.

[67] If the information being sought (a record) came into existence less than twenty years **before** the information request was made, access may be refused. Records that were created more than 20 years before the date of the access request are not covered by subparagraph 16(1)(a)(ii).

[68] The records that were responsive to the April 29, 2019 access request were obtained or created during the investigation by the RCMP into the death of the Applicant's son. They came into existence less than twenty years before the date of the access request. As a result, all of the responsive records fall within subparagraph 16(1)(a)(ii) of the *ATIA*.

[69] On that basis, the *ATIA* provides the RCMP with the legal discretion to refuse to disclose such records.

[70] Given the legislative wording and related regulations of the *ATIA* and the *RCMP Act*, I am satisfied that the Applicant's access request falls within the provisions of subparagraph 16(1)(a)(ii) and are exempt from disclosure.

[71] Since the records fall within the exemption, the RCMP *prima facie* had the right to refuse to disclose them.

#### B. *Delegated Authority*

[72] In addition to the legislative authority just discussed, another authorization was also required. The analyst who reviewed the file and made the redaction and disclosure recommendations to the RCMP could only do so if properly authorized on behalf of the Minister of Public Safety and Emergency Preparedness as the head of the RCMP.

[73] The record contains a copy of a Delegation Order made December 4, 2015, in which the person holding the position of Departmental Access to Information and Privacy Coordinator or occupying that position on an acting basis, was granted full authority to exercise the powers and functions of the Minister under both the *Privacy Act* and the *ATIA*.

[74] I am satisfied from the Delegation Order and the affidavit filed with this application by the analyst, that she is one of the persons authorized to exercise the Minister's delegated powers.

[75] The RCMP was entitled to accept and act upon the recommendations of the analyst as she was legally exercising the powers of the Minister at the time.

[76] For all the foregoing reasons, I find that the exemptions in subparagraph 16(1)(a)(ii) were correctly applied by the RCMP when they decided not to disclose the requested records.

[77] The next step is to determine whether the RCMP reasonably exercised their discretion to withhold the records.

IX. **Did the RCMP reasonably exercise their discretion to redact or withhold records?**

[78] The affidavit provided by the analyst outlines the reasons underlying her recommendation that subparagraph 16(1)(a)(ii) applied. Those reasons track the legislation and need not be discussed.

[79] The analyst also set out her reasons for recommending the exercise of discretion to release some information that was already provided to the Applicant by the investigating detachment as her son's next of kin. Some information was released because it was related to the Applicant. The analyst stated that the majority of the material was withheld as the Applicant was not involved in the occurrence that was the subject of the access request. The analyst then received a request from the OIC to reconsider whether some information could be released on compassionate grounds as there might be a broader interest in disclosing some personal information to a close relative to help them understand the death of a loved one. After reviewing



the file for a second time, the analyst determined that, based on the circumstances, the file did not meet the requirements of compassionate disclosure.

[80] The record in this application contains a summary of the correspondence of the analyst with the OIC investigator. It shows that two reasons were provided by the analyst for finding that the compassionate disclosure requirements were not met. One was that it was unclear what sort of relationship the Applicant had with her son. The other was that there was information in the file that could be used maliciously or in pursuit of legal action against a third party. Those are the reasons to which the Applicant responded in her affidavit, discussed earlier.

[81] The record further includes copies of the correspondence between the analyst and the OIC. Mentioned in the correspondence as another factor for not disclosing more information to the Applicant is the privacy interest of her son for twenty years following his death. This was communicated to the Applicant in the OIC report of their investigation.

[82] I have decided the reasonableness of the determinations made by the analyst based on my review of the confidential affidavit and the unredacted copies of the documents that were released to the Applicant.

[83] I am also cognizant of the fact that the OIC report, containing the considered opinion of the Commissioner, should not be ignored given their expertise with respect to access to information: *Blank v Canada (Minister of Justice)*, 2005 FCA 405, at paragraph 12 and cases cited therein. I have taken that into account in arriving at my findings.

[84] My review of the unredacted portions of the documents satisfies me that the redactions are based on the exemptions in the legislation. I also am satisfied that the analyst reasonably applied her discretion to withhold documents and portions of documents based on the evidence in the file.

[85] I find the Decision meets the criteria in *Vavilov* at paragraph 85. It is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. It is transparent and intelligible when the unredacted copies of the documents are reviewed. I did not detect any fatal flaws in the reasons given for not exercising any further discretion to release additional documents.

[86] At the hearing of this application, the Applicant questioned the source of the information concerning her relationship with her son. I assured her then, and do so again now, that the unredacted documents indicate that many personal interrelationships were involved. There is evidence to support the concern expressed by the analyst as to the nature of the relationship between the Applicant and her son.

[87] To be clear, I am not saying the Applicant and her son did not have a good relationship. My finding is that there is enough evidence to raise a valid concern as to the nature of the relationship and it is sufficient to support the reasonableness of the exercise of discretion by the analyst.

X. **Conclusion**

[88] The purpose of the Act is to provide the public with a right of access to information contained in records held by the government. This right of access, however, is not absolute. It is subject to the exceptions set out in the Act: *Blank v Canada (Justice)*, 2016 FCA 189 at para 23.

[89] For all the foregoing reasons, this application is dismissed. Although the Respondent seeks costs, in the exercise of my discretion I have determined not to award costs.

[90] For whatever solace it might bring the Applicant and her surviving children, there may be some light at the end of the tunnel for her situation and others in similar circumstances.

[91] The OIC report indicates that the investigation of the Applicant's complaint and other recent investigations involving similar unfortunate circumstances highlighted what the OIC sees as shortcomings in the interplay between the *Privacy Act* and the *ATIA* in their current form.

[92] The Commissioner has recommended amendments to section 26 of the *Privacy Act* and section 19 of the *ATIA*, to provide the head of an institution with the discretionary power to disclose personal information about a deceased person to their spouse or close relative for compassionate reasons.

[93] The change, if it occurs, may or may not allow the Applicant to obtain further information. For the moment, it offers some hope.

[94] This application is dismissed, without costs.

**JUDGMENT in T-437-20**

**THIS COURT'S JUDGMENT is that** this application is dismissed, without costs.

"E. Susan Elliott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-437-20

**STYLE OF CAUSE:** PATRICIA L SCHOENDORFER v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY WAY OF VIDEOCONFERENCE

**DATE OF HEARING:** FEBRUARY 16, 2021

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** AUGUST 30, 2021

**APPEARANCES:**

Patricia L Schoendorfer ON HER OWN BEHALF

Daniel Vassberg FOR THE RESPONDENT

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