

Federal Court



Cour fédérale

**Date: 20210804**

**Docket: T-11-20**

**Citation: 2021 FC 814**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, August 4, 2021**

**Present: The Honourable Madam Justice St-Louis**

**BETWEEN:**

**YVES MAYRAND**

**Applicant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application for judicial review pursuant to section 41 of the *Access to Information Act*, RSC 1985, c A-1 [the ATIA]. The application relates specifically to the refusal by the Canada Revenue Agency [the Agency] to disclose certain records, or portions thereof, to Yves Mayrand, the applicant.

[2] Through this application, Mr. Mayrand is seeking to obtain the information that was redacted from the documents provided to him.

[3] Subsections 19(1) and 24(1) and paragraph 21(1)(b) of the ATIA were cited before the Court to justify the non-disclosure of information to Mr. Mayrand.

[4] In short, as required by the ATIA, the Court has reviewed the redacted information and finds that the Agency correctly applied the exemptions in the ATIA and reasonably exercised its discretion not to disclose the information, where such discretion is provided.

## II. Background

[5] On July 4, 2014, Mr. Mayrand filed an initial access to information request seeking copies of any documents relating to four grievances concerning his work as an auditor with the Agency.

[6] On January 6, 2015, the Agency provided the documents to Mr. Mayrand [Communication No. 1]. Some of the documents had been redacted, some in their entirety and some in part. The Agency invoked paragraphs 16(1)(c) and 21(1)(a) and (b) and subsections 19(1) and 24(1) of the ATIA. Mr. Mayrand attempted to lodge a complaint with the Information Commissioner, but since the time limit had expired, the complaint was not accepted.

[7] On April 16, 2015, Mr. Mayrand submitted a follow-up access request in which he asked that the deleted passages be provided to him pursuant to sections 8 and 12 of the ATIA.

[8] On September 29, 2015, the Agency resent the same documents it had provided to him on January 6 [Communication No. 2].

[9] On October 1, 2015, Mr. Mayrand filed a complaint with the Office of the Information Commissioner of Canada [the Commissioner or the OIC] that was essentially aimed at obtaining the requested information. Mr. Mayrand stated that he was complaining about the delay in processing his request and was seeking access to the exempted information. The OIC initiated an investigation.

[10] On September 20, 2017, the Agency received from the OIC a detailed analysis grid that included observations regarding Communication No. 2. On December 11, 2017, the Agency sent Mr. Mayrand a new, less redacted version of 36 of the pages it had previously sent him [Communication No. 3]. On March 12, 2019, the OIC wrote to the Agency. Because this communication was confidential, the Court cannot reveal its contents.

[11] Following comments from and discussions with the OIC, on June 21, 2019, the Agency sent Mr. Mayrand documents disclosing additional information, as the Agency was no longer invoking paragraphs 16(1)(c) and 21(1)(a) of the ATIA. In addition, the Agency reduced the redactions made under paragraph 21(1)(b) of the ATIA. However, the redactions made pursuant to subsections 19(1) and 24(1) of the ATIA remained unchanged [Communication No. 4].

[12] Communication No. 4 is the one before this Court. As described by the Minister in the Respondent's Memorandum, the public version of Communication No. 4, transmitted to

Mr. Mayrand with opaque redactions, is Exhibit H attached to the affidavit of Stefanie Thaverne, a manager in the Agency's Access to Information Directorate who testified on behalf of the Minister. The confidential version of Communication No. 4, with transparent redactions, is Exhibit J attached to Ms. Thaverne's affidavit.

[13] As the Minister also points out, the documents contain a total of 3,449 pages. Of these 3,449 pages, 1,565 are completely or partially redacted, 1,879 were provided to Mr. Mayrand unredacted, and 5 are duplicates of pages provided to Mr. Mayrand unredacted. Ms. Thaverne explained that in reviewing the documents for her affidavit, she found that 2 pages redacted pursuant to subsection 19(1)—pages 0827 and 0828 following the original numbering—had since been disclosed to Mr. Mayrand unredacted. Accordingly, the Court must make a finding with regard to a total of 1,563 partially or completely redacted pages.

[14] Ms. Thaverne further stated that some information redacted under subsection 19(1) of the ATIA should also have been redacted under subsection 24(1) of the ATIA (paragraphs 39, 42–43 of Ms. Thaverne's affidavit).

[15] Given the large volume of documents, to facilitate the Court's review, exhibits L, M, N and O were appended to Ms. Thaverne's affidavit. These are excerpts from Exhibit J, containing only those documents with redactions under the following provisions: subsections 19(1) and 24(1), Exhibit L; subsection 19(1), Exhibit M; subsection 24(1), Exhibit N; and paragraph 21(1)(b), Exhibit O. The Court therefore examined these documents for the purpose of rendering this decision.

[16] On August 22, 2019, the OIC communicated the results of its investigation to Mr. Mayrand through its report. In it, the OIC noted that the Agency had made two additional releases dated December 11, 2017, and June 21, 2019, and that the Agency had sought Mr. Mayrand's comments but its letter to him was returned with the inscription "unclaimed." The OIC stated that it had therefore been unable to confirm Mr. Mayrand's interest in continuing the investigation and had not analyzed the remaining undisclosed information.

[17] According to the report, the OIC had therefore terminated its investigation without completing it. The Commissioner stated that the complaint was well founded, but that conclusion was based on Communication No. 2, which contains more redactions than Communication No. 4, which is in fact the last one sent to Mr. Mayrand.

[18] As argued by the Minister, the OIC's August 22, 2019 report does not indicate which redactions under the exemptions are problematic, does not contain the equivalent of the March 12, 2019 statement requesting additional justifications, and makes no recommendations to the Agency.

### III. Arguments

#### A. *Mr. Mayrand*

[19] Mr. Mayrand initiated this application in December 2019. On January 14, 2020, he filed an affidavit and documents, and on September 21, 2020, he filed his Applicant's Record containing his memorandum of fact and law.

[20] At the hearing, Mr. Mayrand attacked the validity of Ms. Thaverne's affidavit. He had not previously raised this argument, however, and in accordance with the case law on the subject, the Court will not consider it and will not invalidate the affidavit.

[21] In his application for review, Mr. Mayrand first argues that the Agency's new exemption claim pursuant to subsection 24(1) of the ATIA is untimely. He further argues that the Agency is not justified in applying subsections 16(1), 19(1) and 24(1) to the requested information and in using paragraphs 21(1)(a) and (b) of the ATIA to exempt a certain portion of the requested information.

[22] He submits that the standard of correctness should be used in analyzing exemptions claimed under the ATIA, and that the standard of review that should be applied in assessing the exercise of discretion is the one set out in *Maple Lodge Farms LTD v Government of Canada*, [1982] 2 SCR 2 at pages 7 and 8.

A. *The Minister*

[23] The Minister submits that the applicability of exemptions under the ATIA is reviewed on a standard of correctness, while the standard of reasonableness applies when reviewing the exercise of discretion in relation to those exemptions.

[24] The Minister points out that not all of the exemptions alleged by Mr. Mayrand to be improper are actually at issue given that in the last communication to Mr. Mayrand, Communication No. 4, the Agency waived the exemptions under paragraphs 16(1)(c) and

21(1)(a) and disclosed the information that had previously been redacted on the basis of those provisions. The exemptions at issue before the Court are therefore those set out in subsections 24(1) and 19(1) and paragraph 21(1)(b) of the ATIA.

[25] The Minister essentially argues that the Agency correctly applied the exemptions in the ATIA, and that the Agency reasonably exercised the discretion conferred on it by the ATIA.

#### IV. Analysis

##### A. *Standard of review*

[26] I agree with the parties as to the standard of review. As the Minister states, on an application for review of a refusal to disclose records or information, the question of whether an exemption used to justify the refusal actually applies is reviewed on a standard of correctness. This means that “the Court must determine on a standard of correctness whether the record requested falls within an exemption.” Discretionary decisions made by the government institution, on the other hand, are reviewed on a standard of reasonableness (*Husky Oil Operations Limited v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 FCA 10, at paragraph 15). Section 44.1 of the ATIA, in force as of June 21, 2019, confirms this approach, developed by the case law. This section provides under the subheading “*De novo* review” that “[f]or greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.”

[27] Thus, if the Court finds on the standard of correctness that the Agency has erred, section 49 of the ATIA empowers the Court to substitute its decision for that of the Agency and to order the disclosure of the record or passage. However, this remedial power is exhausted once the Court finds that the Agency has correctly interpreted these criteria (*Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8; *Yeager v Canada (National Parole Board)*, 2008 FC 113).

[28] Not all the exemptions challenged by Mr. Mayrand are actually in play, given that the information initially exempted pursuant to paragraphs 16(1)(c) and 21(1)(a) of the ATIA was subsequently disclosed by the Agency in Communication No. 4. As previously mentioned, the exemptions at issue before the Court are therefore those provided for in subsections 24(1) and 19(1) and paragraph 21(1)(b) of the ATIA.

B. *Information redacted pursuant to subsection 24(1) of ATIA*

[29] Subsection 24(1) of the ATIA provides for statutory prohibitions against disclosure and states that “[t]he head of a government institution shall refuse to disclose any record requested under this Part that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.” This prohibition is not accompanied by any residual discretion to disclose records. The provisions listed in Schedule II include section 295 of the *Excise Tax Act* (RSC 1985, c E-15) and section 241 of the *Income Tax Act* (RSC, 1985, c 1 (5th Supp)).



[30] Pursuant to subsection 24(1) of the ATIA, certain disclosures are therefore prohibited under section 295 of the *Excise Tax Act* and section 241 of the *Income Tax Act*.

[31] Subsection 295(1) of the *Excise Tax Act* defines “confidential information” as “information of any kind and in any form that relates to one or more persons and that is (a) obtained by or on behalf of the Minister for the purposes of [Part IX of the *Excise Tax Act* (Goods and Services Tax)], or (b) prepared from [such] information”. Subsection 295(2) prohibits knowingly providing confidential information, allowing it to be provided, allowing any person to have access to it, or using it outside the administration or enforcement of Part IX of the *Excise Tax Act*.

[32] Subsection 241(1) of the *Income Tax Act* contains a prohibition very similar to the one found in subsection 295(2) of the *Excise Tax Act*. The definition of “taxpayer information” is found in subsection 241(10) of the *Income Tax Act* and is almost identical to the definition of “confidential information” in subsection 295(1) of the *Excise Tax Act*. This provision was interpreted in *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430 at 443–44, and that interpretation can be applied to section 295 of the *Excise Tax Act* (*Bradwick Property Management v Canada (National Revenue)*; 2019 FC 289; *Canada (National Revenue) v Bradwick Property Management Services Inc.*, 2020 FCA 147).

[33] The vast majority of the documents and information protected by the Agency—1,254 of the 1,565 redacted pages—are protected under this exemption set out in subsection 24(1) of the ATIA. They have been grouped together in Exhibit N of Ms. Thaverne’s affidavit. The Court has

examined the information redacted from the documents on the basis of the exemption in subsection 24(1) of the ATIA and agrees with the Minister that the redacted information falls within the scope of that provision. As argued by the Minister, these are documents submitted to the Agency by tax registrants/taxpayers, correspondence between the Agency and these persons, and documents relating to the audit conducted by the Agency based on these documents. The information contained in these documents is “confidential information” within the meaning of subsection 295(1) of the *Excise Tax Act*. Furthermore, the Court is also satisfied that the limited authorizations to provide confidential information found in section 295 do not apply in this case. Furthermore, the confidential information protected by subsection 241(1) of the *Income Tax Act* includes taxpayer information associated with tax registrants, including individuals’ social insurance numbers.

[34] The Court found no error in the Agency’s treatment of the information under subsection 24(1) of the ATIA. The Agency correctly applied this exemption.

C. *Information redacted pursuant to subsection 19(1) of ATIA and discretionary power of subsection 19(2)*

[35] Section 19 of the ATIA states:

19(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Part that contains personal information if

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

[36] Section 3 of the *Privacy Act* (RSC 1985, c P-21) lists the types of information considered to be personal information.

[37] Section 3 also provides that certain information is not personal information within the meaning of the ATIA, and subparagraph 3(j)(v) specifically covers information about a current or former officer or employee of a government institution that relates to his or her position or functions, including “the personal opinions or views of the individual given in the course of employment”. I am satisfied that this element is not at issue in this case given that the information redacted pursuant to subsection 19(1) of the ATIA does not involve such opinions or views.

[38] The information redacted under subsection 19(1) of the ATIA is found in Exhibit M of Ms. Thaverne’s affidavit, and the Court is satisfied that the exemption was properly applied.

[39] The Court agrees with the Minister’s position regarding Mr. Mayrand’s argument that the exemption was raised too late.

[40] Finally, there is no evidence that the Agency acted unreasonably in not exercising its discretion under subsection 19(2) of the ATIA. Indeed, the evidence does not reveal that any of the situations that would have allowed the Agency to disclose the records applied in this case.

D. *Information redacted under paragraph 21(1)(b) of ATIA*

[41] Paragraph 21(1)(b) of the ATIA states:

21(1) The head of a government institution may refuse to disclose any record requested under this Part that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

**(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,**

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation.

(Emphasis added)

[42] In paragraphs 45 to 50 of the Respondent's Memorandum, the Minister set out the principles that have emerged through the case law. For the purposes of this review, the important point is that "[m]ost internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph (a) or (b) of subsection 21(1)." (*Canadian Council of Christian Charities v Canada (Minister of Finance)* [1999] 4 FC 245 (CA) at paragraphs 39–40).

[43] In this case, after examining the information redacted pursuant to paragraph 21(1)(b) of the ATIA, and found in Exhibit O of Ms. Thaverne's affidavit, I arrive at the same conclusion as

Ms. Thaverne. The redacted documents were less than 20 years old at the time of the access request, a government institution was involved, and the redacted pages contain records of consultations or deliberations. The documents contain accounts of consultations or deliberations among public servants who are members of the Agency's management team and labour relations group. The examination reveals that these consultations and deliberations do indeed address potential options for management pertaining to decisions to be made and the conduct of ongoing grievances, including with respect to Mr. Mayrand. In light of the legislation and case law, this information was correctly redacted, and the Agency properly applied the exemption.

[44] Moreover, as Justice Evans noted in *Canadian Council of Christian Charities*, “[t]here is very little role for the Court in overseeing the exercise of this discretion.” Therefore, based on the process followed by Ms. Thaverne and given the circumstances, I find that the Agency acted reasonably in refusing to disclose documents and passages that could be protected pursuant to paragraph 21(1)(b) of the ATIA.

**JUDGMENT in T-11-20**

**THE COURT'S JUDGMENT is as follows:**

- Mr. Mayrand's application is dismissed.
- Access to the exempted information is denied.
- Costs are awarded in favour of the Minister.

**"Martine St-Louis"**

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Judge

Certified true translation  
Michael Palles, Reviser

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

**DOCKET:** T-11-20

**STYLE OF CAUSE:** YVES MAYRAND v. MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** MONTRÉAL, QUEBEC (BY VIDEOCONFERENCE)

**DATE OF HEARING:** MARCH 1, 2021

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**DATED:** AUGUST 4, 2021

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