

Federal Court



Cour fédérale

Date: 20211105

Docket: T-661-20

Citation: 2021 FC 1180

Ottawa, Ontario, November 5, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GERALD BRIAN RUNDEL

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under section 41(1) of the *Access to Information Act*, RSC 1985, c A-1 [the “*ATIA*”] of a decision by the Royal Canadian Mounted Police [RCMP]. The decision responded to the Applicant’s access to information request concerning communications related to an incident that took place in the Vancouver International Airport on October 14, 2007.

II. Background

[2] The Applicant is a member of the RCMP assigned to the Federal Serious Organized Crime Unit in Nanaimo, British Columbia.

[3] On October 14, 2007, the Applicant was one of four responding RCMP officers at an incident at the Vancouver International Airport, which resulted in the death of an individual [the “YVR Incident”]. The Applicant was also involved in the subsequent public inquiry and resulting legal proceedings.

A. *The Applicant’s Access to Information Request*

[4] On August 19, 2013, the Applicant submitted an access to information request to the RCMP, which was assigned RCMP ATIP File No. A-2013-05162 [the “Request”]. The Request requested all communications leading to, and following, the issuance of a Form 1004 (RCMP Performance Log) regarding the actions of the Applicant as they related to the YVR Incident. The issuance of a Form 1004 constitutes operational guidance – this is not a disciplinary matter nor one that involves the RCMP’s Code of Conduct.

[5] At the same time, the Applicant submitted two other access to information requests, one of which sought records related to an alleged internal RCMP report authored by Superintendent Wade Blizzard [the “Blizzard Report”] and was assigned RCMP ATIP File No. A-2013-05950. The RCMP has since denied the existence of the Blizzard Report.

[6] On August 1, 2014, the RCMP disclosed records in response to the Request, withholding some information under subparagraph 16(1)(a)(ii) of the *ATIA*.

B. *The Applicant's Complaint to and Investigation by the Office of the Information Commissioner of Canada*

[7] On August 25, 2014, the Applicant filed a complaint [the "Complaint"] with the Office of the Information Commissioner of Canada [the "OIC"].

[8] On September 16, 2014, the RCMP was sent a Notice of Intention to Investigate and Summary of Complaint [the "Notice"] pursuant to section 32 of the *ATIA*. The Complaint alleged that the RCMP failed to provide all records responsive to the Request. It further alleged that the RCMP was unreasonably delayed in its response.

[9] On or about July 7, 2015 and in response to the Notice, the RCMP Access to Information and Privacy Branch issued a further call-out, or re-task, for documents responsive to the Request. On May 20, 2016 and July 3, 2018, the RCMP disclosed additional records that had been located as a result of the re-task in respect of the Request, withholding some information under subparagraph 16(1)(a)(ii) and subsection 19(1) of the *ATIA*, respectively.

[10] On January 16, 2019, the OIC wrote the RCMP to report the results of its investigation of the Complaint. The OIC set out in detail the scope of the investigation and the efforts made to date by the RCMP to respond to the Request. The OIC stated that it was largely satisfied with the breadth of the RCMP's tasking, subject to one area that appeared likely to contain responsive

records but which had not been tasked to search. The OIC also found that the RCMP had interpreted the Request too narrowly, thereby incorrectly limiting its search. As a result, the OIC determined that the RCMP had not conducted a reasonable search and provided two recommendations to address the aforementioned concerns.

[11] On or about February 1, 2019, the RCMP implemented the OIC's recommendations. On May 12, 2020, the RCMP disclosed further records to the Applicant, withholding some information under sections 13(1)(c), 16(2), 19(1), and 23 of the *ATIA*.

[12] On May 22, 2020, the OIC issued its final report regarding the Complaint. While the Complaint was determined to be well-founded, the OIC confirmed that the RCMP had accepted its earlier recommendations, conducted new searches for additional records, and provided additional responsive records.

III. Decision Under Review

[13] Pursuant to subsection 41(1) of the *ATIA*, the Applicant is seeking review of the RCMP's disclosure in response to the Request.

IV. Issue

[14] The sole issue in this application is whether the Respondent has discharged its burden to search for and disclose all relevant records in response to the Request pursuant to subsection 48(1) of the *ATIA*.

V. Standard of Review

[15] 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 as a new proceeding.

VI. Relevant Provisions

[16] Pursuant to section 4 of the *ATIA*, a Canadian citizen or permanent resident has a right to access any record under the control of a government institution. This right is limited by a number of exemptions provided in the *ATIA*.

[17] Where a request has been made under section 6 of the *ATIA*, the head of the government institution subject to the request must provide access to the records or provide written notice that access will not be granted within 30 days [section 7 of the *ATIA*]. Where the head of a government institution fails to meet this time limit, it shall be deemed to have refused access [subsection 10(3) of the *ATIA*].

[18] The OIC may receive and investigate complaints from persons who have been refused access to a record [paragraph 30(1)(a) of the *ATIA*]. During and following an investigation, the OIC will provide reports to the government institution outlining their findings and recommendations [subsections 37(1) and (2) of the *ATIA*].

[19] Under subsection 41(1), a person who makes a complaint and receives a final report by the OIC, may apply to this Court for a review of the matter that is the subject of the complaint. This application is to be heard and determined as a new proceeding [section 44.1 of the *ATIA*].

[20] In any proceeding before this Court, the burden of establishing that the head of the government institution is authorized to make the decision that is the subject of the proceeding is on the government institution concerned [subsection 48(1) of the *ATIA*].

[21] Sections 49 to 50.2 provides this Court the power to make an order for the disclosure of specific records or other actions that it considers appropriate in light of its determination of the application.

VII. Analysis

[22] The Applicant's written submissions are largely silent on the issue in the current proceeding. Rather, the submissions speak to a broad dissatisfaction with RCMP disclosure processes, which is outside the scope of the current matter before this Court.

[23] While the Applicant asserts a "lack of clarity" on the part of the Respondent in its use of exemptions under the *ATIA*, the Applicant provides no submissions or evidence that they were incorrectly applied. In fact, the OIC is conducting a separate investigation in regards to the use of exemptions by the RCMP in fulfilling the Request.

[24] The Applicant also alludes to a “deemed refusal” on the part of the Respondent but no submissions on this point are provided.

A. *Has the RCMP discharged its burden to search for and disclose all relevant records?*

[25] Pursuant to section 44.1 of the *ATIA*, this Court is to conduct a new proceeding when reviewing the subject matter of a complaint. The subject matter of the Complaint currently before this Court for review pursuant to subsection 41(1) of the *ATIA* can be separated into two parts. First, the timeliness of the Respondent’s provision of access [the “Delay Complaint”] and, second, the reasonable search and disclosure of all relevant records [the “Search Complaint”].

(1) The Delay Complaint

[26] In the Complaint, the Applicant alleges that the Respondent unreasonably delayed its response to the Request. As set out in section 7 of the *ATIA*, the head of the government institution subject to the request must provide access to the records or provide written notice that access will not be granted within 30 days. The Respondent received the Request on August 23, 2013. Though the Respondent did acknowledge receipt of the Request in a timely manner, it did not provide responsive records until August 1, 2014 – about one year later.

[27] Where the head of a government institution fails to meet the 30-day time limit, it shall be deemed to have refused access [subsection 10(3) of the *ATIA*]. The Respondent has clearly failed in this regard, and the Court has sympathy for the frustration and efforts of the Applicant to obtain relevant documents in respect of his *ATIA* request.

[28] Nevertheless, no apparent prejudice or injury to the Applicant appears to have resulted from the delay. The Respondent has since disclosed numerous records on four different occasions. Indeed, the OIC reported the complaint regarding delay to have been resolved.

(2) The Search Complaint

[29] The Complaint alleges that the Respondent did not conduct a reasonable search for records in response to the Request. Pursuant to subsection 48(1) of the *ATIA*, the onus is on the Respondent to discharge its burden that it reasonably conducted its search for records in response to the Request.

[30] The Respondent has provided evidence demonstrating its multiple searches re-tasked throughout various relevant divisions in both British Columbia and Ontario. Upon the recommendation of the OIC, the Respondent increased both the breadth and scope of its search to include another RCMP division and less restrictive keywords. In its final report, the OIC found that though the Complaint was well-founded, the Respondent had implemented its recommendations and further disclosure was made.

[31] The Applicant has not provided substantive evidence or argument to refute the Respondent's position. The Applicant was provided an opportunity to cross-examine the evidence but did not. The majority of the Applicant's written submissions and evidence do not speak to the issue in this proceeding. The Affidavit of Shirley Heafey has been given little weight, as it speaks little to the issue of this matter and is focused more broadly on the conduct of the RCMP.

[32] During the hearing, the Applicant specifically focused attention to the lack of disclosure of the alleged Blizard Report and related records that were presumably reviewed by Superintendent Blizard in the preparation of the Blizard Report. As stated previously, the RCMP has denied the existence of the Blizard Report in response to a different ATIP request. In addition, the Blizard Report appears to have been discussed in terms of disciplinary matters, which are outside the scope of the Request.

[33] Upon review of the records that may have been reviewed by Superintendent Blizard, these too appear to be outside of the scope of the Request. Some are outside the date range specified in the Complaint, while others refer to disciplinary or other matters outside the scope of the Request.

[34] The Applicant also describes a secret RCMP O: drive, which he believes may hold records that he is seeking and that have not been disclosed. There is no evidence that relevant information relating to the Request exists in this drive or that it has not been searched by the RCMP.

[35] Again, while it is regrettable that the Respondent required an OIC investigation to motivate a thorough and reasonable search, it appears on the record that such a reasonable search and disclosure was eventually achieved. The Respondent has discharged its burden to search for and disclose the relevant records in response to the Request pursuant to subsection 48(1) of the *ATIA*.

[36] Given the time frame involved in trying to resolve the issue of production of relevant documents and the dragging of the RCMP's heels in cooperating fully, I exercise my discretion in deciding that no costs are to be awarded.

JUDGMENT in T-661-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-661-20

STYLE OF CAUSE: GERALD BRIAN RUNDEL v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 1, 2021

REASONS FOR JUDGMENT AND JUDGMENT: MANSON J.

DATED: NOVEMBER 5, 2021

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