Federal Court  Cour fédérale

Date: 20220531

Docket: T-1797-21

Citation: 2022 FC 791

Ottawa, Ontario, May 31, 2022

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

ELSA JOSEPH

Applicant

and

ATTORNEY GENERAL/CANADA SCHOOL OF PUBLIC SERVICE

Respondent

REASONS FOR ORDER AND ORDER

I. Background

[1] The Applicant has brought an application for judicial review of a report of the Office of the Privacy Commissioner of Canada ("OPC") made pursuant to section 35 of the *Privacy Act*, RSC 1985 c P-21. As permitted by Rule 317 of the *Federal Courts Rules*, the Applicant requested communication of the full record of material that was before the OPC when the

decision was made; this material is generally referred to as the Certified Tribunal Record, or CTR. The motion before the Court was brought by the Office of the Privacy Commissioner, and seeks a confidentiality order pursuant to Rule 151 in respect to the CTR. The Respondent, the Attorney General, supports the motion. The Applicant opposes it.

[2] The applicable test for the issuance of a confidentiality order under Rule 151 was set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, and requires the moving party to establish that a confidentiality order is necessary to prevent a serious risk to an important interest. The risk must be "real and substantial", and "well grounded in the evidence". The OPC's motion does not contain evidence that would satisfy this requirement. Rather, the OPC's motion relies on the presumption, created by the provisions of *Privacy Act*, that Parliament intended the OPC's work to be conducted in confidence and to remain so. It argues that public disclosure of the investigative record in the context of judicial review would undermine this legislative intent, the ability of the OPC to fulfill its mandate, and by extension, public confidence in the OPC. The OPC cites the recent decision of this Court in *Democracy Watch v Canada (Attorney General)*, 2021 FC 1417 as authority for the issuance of a confidentiality order in similar circumstances.

[3] The OPC's motion was originally made in writing, pursuant to Rule 369. Although the Applicant intended to oppose the motion, her responding record was submitted without proof of service on the other parties and was accordingly refused for filing. While the motion was thus not formally opposed, confidentiality orders infringe upon the fundamental principle of open and accessible court proceedings. That principle, which ties into the Charter-protected right to

freedom of expression, is of such importance that the Court has a duty to protect it, even when a request for a confidentiality order is unopposed, or when all parties might prefer that their litigation be conducted in confidence (see *R v Mentuck*, 2001 SCC 76, at paragraph 38).

[4] In considering the record submitted by the OPC and the case law upon which it relies, the Court noted that neither the Court in *Democracy Watch*, nor the parties on this motion, had engaged with the Federal Court of Appeal's analysis in *Desjardins v Attorney General*, 2020 FCA 123. The Court considered that the analysis in *Desjardins* might call for a more nuanced application of the principles discussed in *Democracy Watch*. The Court therefore asked the parties to participate in an oral hearing to make further submissions on these issues. The Applicant declined to participate in the hearing but filed brief written submissions reiterating her opposition to the issuance of a confidentiality order and pointing out that all of the record, with the exception of the communications between the OPC and the federal institution, is already on the public record in another application. The hearing proceeded on May 18, 2022, with both the OPC and the Attorney General making submissions in support of the motion.

[5] For the reasons set out below, the OPC's motion is dismissed.

II. Analysis

[6] In its initial response to the Applicant's request for the CTR, the OPC acknowledged that the material it gathered during its investigation and that was before it when it issued the report at issue is relevant within the meaning of Rule 317. The OPC recognized that this material is relevant to the application for judicial review as it "may affect the decision that the Court will

make on the application, having regard to the nature of the application, the grounds of review invoked by the applicant and the nature of judicial review" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 109, citing *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at page 460 (CA)). The OPC advised that the CTR includes: a complaint form, representations from the Applicant in support of her complaint, representations from the CSPC responding to the Applicant's complaint, various email exchanges between the Applicant and the OPC, various email exchanges between the CSPS and the OPC, and several notes to file from the investigator assigned to this complaint.

[7] The OPC noted that pursuant to section 63 of the *Privacy Act*, it is prohibited from disclosing information that came to its knowledge in the performance of its duties and functions under the *Privacy Act*, subject only to limited exceptions that do not expressly include judicial review. The OPC, however, did not object to producing the CTR. Rather, the OPC took the position that it could and would produce the tribunal record under seal pursuant to a confidentiality order under Rule 151, as was done in *Democracy Watch*, hence the present motion.

[8] *Democracy Watch* involved an application for judicial review of two reports prepared by the Lobbying Commissioner regarding alleged non-compliance with the *Lobbyists' Code of Conduct*. In the context of that application, the Applicant requested transmission of the record of investigation carried out by the Lobbying Commissioner. The *Lobbying Act*, RSC 1985, c 44 (4th Supp) contains provisions very similar to section 63 of the *Privacy Act.* As with the *Privacy Act*, the Lobbying Commissioner is required to conduct her investigations in private and is precluded from disclosing any information that comes to her knowledge in the course of an investigation,

subject to similarly narrow exceptions. The Lobbying Commissioner objected to the request for transmission on the basis of those statutory provisions, and made a motion for an Order that it is precluded from including in the CTR all investigative material that is not already public, or in the alternative, a confidentiality order protecting that material.

[9] The Court in *Democracy Watch* noted that Parliament, in part to maintain trust and confidence in the investigation process, intended to create a statutory regime that generally protects the confidentiality of information obtained as a result of investigations pursuant to the *Lobbying Act*. At the same time, it agreed that Rules 317 and 318 of the *Federal Courts Rules* achieved the foundational principle of judicial review by requiring the Lobbying Commissioner to produce a CTR containing all relevant materials before her when she made her decision (*Democracy Watch* at paragraphs 11 and 12). The Court did not find the two legislative schemes to be contradictory. Citing *Lukács v Canada (Transportation Agency)*, 2016 FCA 103, the Court concluded that its remedial flexibility permitted it to "craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions […]; (2) procedural fairness; and, (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 [per Iacobucci J] [ed.]" (*Democracy Watch*, paragraph 14).

[10] The Court concluded that the Lobbying Commissioner should be required to produce a CTR containing all materials that are relevant to the judicial review, but agreed that a confidentiality order should be issued because it would "balance out the statutory requirements

of confidentiality in the Act with the obligations to disclose that normally obtain in any application for judicial review" (at paragraphs 19 and 20). The Applicant in that case had agreed that a confidentiality order was appropriate, and the reasons contain no further discussion regarding the application of the *Sierra Club* test to the facts at issue.

[11] It is beyond question that the scheme of the *Privacy Act* creates a statutory regime that generally protects the confidentiality of information obtained as a result of investigations pursuant to the *Privacy Act*, in the same way as the *Lobbying Act* does. It is also evident that the legislative scheme constitutes a strong indicator that the confidentiality requirement was put in place to assist the OPC in carrying out its mandate and to maintain trust and confidence in the investigative process, both of which are important interests that merit protection. In that, the circumstances in this case are indistinguishable from the circumstances in *Democracy Watch*.

[12] The OPC and the Attorney General urge that the conclusion to be drawn from *Democracy Watch* is that conciliating confidentiality provisions such as those found in of the *Privacy Act* and the disclosure requirements of Rules 317 and 318 entails that a confidentiality order be issued in respect of any part of the OPC's record of investigation that is not already public.

[13] The same broad conclusion appears to have been reached in *Canada (Attorney General) v Canada (Information Commissioner)*, 2002 FCT 128, [2002] 3 F.C. 630 (*Hartley FCT*), aff'd at 2003 FCA 285 (*Hartley FCA)*. In *Hartley FCT*, the Information Commissioner argued that it was prohibited by the *Access to Information Act* from providing confidential information to the Court in the context of a judicial review proceeding. It also submitted that the Court cannot compel compliance with Rules 317 and 318 because the Rules are in direct conflict with the *Access to*

Information Act and that this statute must prevail over the Rules. It bears noting that the statutory provisions involved were similar to those of the *Privacy Act* at issue here.

[14] Distinguishing previous decisions that had upheld the Information Commissioner's argument, McKeown J. reasoned that to allow a decision maker to refuse to disclose a record for a matter that is otherwise reviewable would defeat the purpose of judicial review. As he stated at paragraph 31, "[t]his would be the most effective privative clause that Parliament could design. Parliament certainly intended to avoid making the transcripts public but never intended to give the Information Commissioner the right to conduct investigations without any review." He went on to conclude, at paragraph 38, that to the extent the Court could obtain the transcript at issue confidentially, there was no conflict between Rules 317 and 318 and the provisions of the *Access to Information Act*.

[15] The decision was maintained on appeal with the following brief reasons:

> The Motions Judge did not err in concluding that Rules 317 and 318 of the *Federal Court Rules, 1998*, SOR/98-106 do not conflict with the *Access to Information Act*, R.S.C. 1985, c. A-1. Nor did he err in distinguishing this case from *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (Fed. C.A.) or *Canada (Attorney General) v. Canada (Information Commissioner)* (1997), [1998] 1 F.C. 337 (Fed. T.D.)("*Petzinger*"). Those cases are distinguishable in two respects. First, the applicants in these proceedings have requested that the material be filed with the Court and with counsel on a confidential basis pursuant to Rule 152 of the *Federal Court Rules, 1998*. Second, unlike in *Rubin* and *Petzinger*, the very matter under review in these applications is the investigatory processes of the Information Commissioner. Without access to the transcripts, it will be difficult, if not impossible, for the applicants to put forward their case.

[16] What is to be retained from those decisions is that, no matter how broad confidentiality provisions may be in the statutes governing the work of administrative decision makers, they cannot be interpreted so strictly as to defeat the ability of the Courts to review the legality and reasonability of their actions. The reviewability of the decision maker's work must be read into the statute, and its confidentiality provisions must be interpreted and applied to permit a meaningful review. The Court must then use its remedial flexibility to balance the needs of judicial review and the interests intended to be served by the confidentiality provisions. The use of confidentiality orders can help achieve that balance.

[17] This cannot be taken to mean that this balance requires the systematic issuance of confidentiality orders. If one accepts that reviewability of decisions must be read into a statute in interpreting its confidentiality provisions, then one must also accept that the fundamental principles that govern judicial review, including that of procedural fairness and of open and accessible court proceedings, must also be read into it. To paraphrase and carry through with the reasoning of Justice McKeown in *Hartley FCT*, if Parliament never intended to give the Privacy Commissioner the right to conduct investigations without any review, it also never intended to require the Court to conduct that review otherwise than in accordance with constitutional principles.

[18] Stratas J. in *Lukács*, cited with approval in *Democracy Watch*, above, described the three objectives to be reconciled in determining how a CTR is to be constituted as follows: "(1) meaningful review of administrative decisions […]; (2) procedural fairness; and, (3) the protection of any legitimate confidentiality interests <u>while permitting as much openness as</u>

possible in accordance with the Supreme Court's principles in [Sierra Club]" (Emphasis added). In crafting a remedy to balance the confidentiality interests embodied in the statute against the needs of judicial review, of procedural fairness and of openness, the Court cannot surrender its discretion and mechanically impose confidentiality strictures to all materials the decision maker chose not to disclose in its report. The Court must take into account the equally fundamental right to open and accessible court proceedings and apply the test and framework of analysis set out in *Sierra Club* to the specific facts and circumstances before it.

[19] The Federal Court of Appeal in *Desjardins*, above, specifically held that a finding that Parliament considered the confidentiality of certain investigative materials essential to the purpose of the enabling statute is not by itself sufficient to support the issuance of a confidentiality order.

[20] The statute at issue in *Desjardins* was the *Public Servants Disclosure Protection Act*, S.C. 2005 c. 46 (the "PSDPA"), which contains provisions to protect the identity of civil servants involved in investigations. Over the objection of the applicant, the Federal Court had granted the Public Sector Integrity Commissioner's motion for a broad confidentiality order that would shield the identity of all complainants and witnesses from the public, including anything that might identify them.

[21] On appeal, the Federal Court of Appeal did not take issue with the motions Judge's conclusion that the *PSDPA* made it clear "that the public disclosure of whistleblowers' identity would risk thwarting the purposes of the Act, particularly the purpose of ensuring effective

disclosure procedures" (as cited in paragraph 39 of *Desjardins*). Where the Federal Court was found to have erred was in its conclusion "that it was "not always necessary to provide evidence in support of a motion for a confidentiality order" and that harm could be "objectively" discernable" (*Desjardins* paragraph 37). The Federal Court of Appeal held that one could not meet the criteria for the issuance of a confidentiality order merely from the intentions and objectives stated in a statute:

> [90] In my opinion, the Judge confused an important interest, that is, protecting persons who make a disclosure and witnesses, with a serious risk of harm that could result from disclosing their identity. In other words, the fact that Parliament stated in the Act that in order to maintain public confidence in the integrity of the public service it was necessary to establish disclosure and protection procedures does not lead to the conclusion that in all cases where a person made a disclosure the public will not be entitled to know the identity of the persons who made the disclosure and the witnesses. It follows from that observation that Parliament did not take into account Rule 151, which stipulates, as I indicated above, that the Court, before making a confidentiality order, "must be satisfied that the material should be treated as confidential".
>
> [91] Consequently, given the strong presumption that courts should be open and that reporting of their proceedings should be uncensored, the Judge had to consider whether, in the case before him, there was or could be a serious risk of harm to the persons who made the disclosure and the witnesses if their identities were made public. In my opinion, the Judge failed to consider this issue because he found that the existence of the Act was sufficient in order to find that there was a serious risk of harm.
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> (emphasis added)

[22] What *Desjardins* teaches is that a statutory recognition that confidentiality is important and that disclosure of certain information risks threatening the purpose of the statute may suffice to establish the existence of an important interest to be protected, but that it is not enough to support the issuance of a confidentiality order. When exercising its discretion under Rule 151,

the Court remains bound to examine all relevant facts and circumstances to discern whether there is a serious risk, well grounded in evidence, that disclosure in the case before it would harm that interest.

[23] The OPC and the Attorney General sought to distinguish *Desjardins* on the basis that the confidentiality provisions in the *PSDPA* are not as stringent or as broad as those in the *Privacy Act.* Notably, the Integrity Commissioner's duty to protect the identity of witnesses and complainants is expressly subject to "any other Act of Parliament" and only "to the extent possible in accordance with law" and the prohibition from disclosure is qualified by the words "[u]nless the disclosure is required by law" (subsection 22(e) and section 44, *PSDPA*).

[24] Although the Federal Court of Appeal notes these provisions at paragraph 93 of its decision, they do not form part of the principal analysis. They are mentioned only because they reinforce the Court's previously reached conclusion that Parliament could not have intended "to convert the discretionary power set out is in Rule 151 into a non-discretionary power" by subordinating the Court's exercise of discretion to what it considers to be the purpose of the Act. As mentioned earlier in these reasons, the ability of the Court to meaningfully exercise its review functions must, on the authority of *Hartley* and *Democracy Watch*, be read into the *Privacy Act* despite the statute's general confidentiality requirement. It would take more than the same general confidentiality requirement to read into the Act an intention on the part of Parliament to displace the fundamental right to open and accessible court proceedings and the principles by which that right is protected.

[25] In conclusion, the Court is satisfied that the confidentiality provisions of the *Privacy Act* were enacted in part to maintain trust and confidence in the investigation process, and that maintaining that trust and confidence is an important public interest. However, in order to issue a confidentiality order, the Court must be satisfied, on sufficient evidence, that the public disclosure of the content of the CTR in this application would create a serious risk of harm to that interest.

III. Application to the facts

[26] The only evidence before the Court concerns what is included in the CTR, namely, a complaint form, representations from the Applicant in support of her complaint, representations from the CSPC responding to the Applicant's complaint, various email exchanges between the Applicant and the OPC, various email exchanges between the CSPS and the OPC, and several notes to file from the investigator. The fact that the Applicant has no objection to the public disclosure of her complaint form, representations and exchanges with the OPC negates any inference that their disclosure could harm the OPC's ability to fulfill its mandate or undermine public trust and confidence in the process. Indeed, it seems that the information is in any event now public.

[27] That leaves for the Court's consideration only the CSPS's responding representations to the complaint, email exchanges between the OPC and the CSPS, and the investigator's notes. There is no evidence before the Court as to why public disclosure of this material in the context of this judicial review might undermine the OPC's ability to carry out its investigative functions or the public trust in them. It is not clear why disclosing this previously confidential material

directly to the Applicant (as the OPC is content to do) would not harm the OPC's ability to carry out its mandate in the future, but that disclosing it to the public might. There is not even an indication of what information these materials might contain. For example, they might contain only the CSPS's position and arguments as to the Applicant's complaint and the law as it applies to undisputed facts. The disclosure of such information can hardly be thought to be prejudicial. It is worth observing that in contrast, the investigative records at issue in *Hartley* and *Democracy Watch* were clearly said to contain true investigative materials, such as transcripts of witness interviews.

[28] The Court finds that as there is no evidence on the record to support a finding that harm could result from public disclosure of the content of the CTR, and that the OPC has therefore not met its burden to show that a confidentiality order is necessary to prevent a serious risk to an important interest. The first branch of the *Sierra Club* test has not been satisfied and a confidentiality order ought not to be issued.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed.

2. The Office of the Privacy Commissioner is to communicate the Certified Tribunal Record to the Applicant and the Registry within 10 days of the date of this Order.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Kelly Stephens	FOR THE OFFICE OF THE PRIVACY COMMISSIONER

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Office of the Privacy Commissioner of Canada Gatineau, QC	FOR THE MOVING PARTY