Federal Court  Cour fédérale

**Date: 20220913**

**Docket: T-1309-21**

**Citation: 2022 FC 1290**

**Ottawa, Ontario, September 13, 2022**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**ALEXANDRU-IOAN BURLACU**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the Matter

[1] Mr. Alexandru-Ioan Burlacu [Applicant] has filed an application for relief under subsection 41(1) of the *Access to Information Act*, RSC 1985, c A-1 [*Act*]. The Applicant seeks review of a decision of the Canada Border Services Agency [CBSA] extending the statutory deadline to respond to the Applicant's request for information by an additional 90 days

[Decision]. Pursuant to section 7 of the *Act*, the statutory deadline to respond to a request is 30 days.

[2] The Applicant seeks an Order, pursuant to paragraph 50.2(a) of the *Act*, declaring that the Decision was unreasonable and violated paragraph 9(1)(a) of the *Act*. The Applicant also seeks costs pursuant to section 53 of the *Act*.

[3] The application for review is dismissed for mootness.

## II. Background

[4] On March 27, 2021, the Applicant made a request to CBSA for "all emails sent on February 25, 2021 and on March 26, 2021 by Andrea Chase, A/Manager, Corporate Relations, to Alex Burlacu" [ATIP Request]. CBSA received the Applicant's ATIP Request on March 29, 2021.

[5] On April 21, 2021, seven days before the expiration of the 30-day deadline, CBSA communicated the Decision to the Applicant. The Decision letter states "[a]n extension of time of up to 90 days beyond the 30 day statutory time limit will be required in order to process [the Applicant's] request." The extension was necessary because "the original time limit would unreasonably interfere with the operations of [CBSA]." The new deadline required CBSA to respond to the Applicant by July 27, 2021.

[6] On April 29, 2021, the Applicant submitted a complaint to the Office of the Information Commissioner [OIC] alleging that the 90-day extension was unreasonable.

[7] On July 20, 2021, a week before the new deadline, CBSA responded to the Applicant's ATIP Request and disclosed 12 pages of documents.

[8] On August 10, 2021, the OIC released its final report, concluding that the Applicant's complaint had been resolved and no further investigation was necessary. The Applicant applied for judicial review on August 23, 2021.

## III. The Statutory Scheme

[9] Every Canadian citizen and permanent resident has a right to access any record under the control of a government institution (*Act*, s 4(1)). Where a request has been made under section 6 of the *Act*, the head of the government institution must, within 30 days after the request is received, provide access to the records or provide written notice that access will not be granted (*Act*, s 7).

[10] The 30-day statutory limit may be extended for a reasonable period of time in certain circumstances. Subsection 9(1) reads:

> 9 (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Part for a reasonable period of time, having regard to the circumstances, if
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would

> unreasonably interfere with the operations of the government institution,
>
> (b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
>
> (c) notice of the request is given pursuant to subsection 27(1)
>
> by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

[11] The OIC can receive and investigate complaints regarding the extension of time limits made under section 9 (*Act*, s 30(1)(c)). A person who makes a complaint and receives a final report from the OIC may apply to this Court for a review of the matter (*Act*, s 41(1)). Sections 49 to 50.2 provide this Court the power to make an Order for the disclosure of specific records or other actions as it considers appropriate.

[12] Where the Court is of the opinion that an application brought under subsection 41(1) raises an "important new principle", the Court shall award costs to an applicant, regardless of the outcome of the application (*Act*, s 53(2)).

## IV. Issues and Standard of Review

[13] After considering the parties' submissions, the issues for determination are:

(1) Is the Application moot?

(2) If the Application is not moot, is the Decision reasonable?

[14] Section 44.1 of the *Act* specifically states that a proceeding brought under section 41 of the *Act* is conducted as a new proceeding, not a review (*Rundel v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1180 at para 15). A new proceeding "is the same as any trial or hearing commenced in the Federal Court where the judge hears the evidence and makes findings of fact" (*Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at para 24). Accordingly, there is no applicable standard of review.

## V. Analysis

### (1) Is the Application moot?

[15] Though limited to his oral submissions, the Applicant submitted that the Application is not moot because there remains a live controversy between the parties. Further, it is in the public interest to have this matter determined because the Court has not examined the reasonableness of an extension before.

[16] The Respondent submits that the Court should decline its jurisdiction to decide the matter. Under the two-part test for determining mootness, there is no longer a live controversy between the parties because the records sought by the Applicant were disclosed. Assessing the reasonableness of the time extension would only amount to an academic exercise with no practical effect on the rights of the parties (*Khan v Canada (Citizenship and Immigration)*, 2021 FC 995 at paras 13-14, 25-27 [*Khan*]).

[17] Turning to the second step of the analysis, the Court should decline to hear the matter because there is no adversarial relationship between the parties, and the specific circumstances or

tangible aspects of the dispute no longer exist (*Germa v Canada (AG)*, 2021 FC 134 at paras 17, 21; *Borowski v Canada (AG)*, [1989] 1 SCR 342 at 358-60, 56 DLR (4th) 231 [*Borowski*]). It would also not be an economical use of judicial resources, given that the outcome yields no practical effect (*Borowski* at 360-62; *Democracy Watch v Canada (AG)*, 2018 FCA 195 at para 18; *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 14). Lastly, this case does not raise a matter of general importance to the public interest (*Rhéaume v Canada (Revenue Agency)*, 2016 FC 1368 at para 35). Rather, the issues are specific to the Applicant and do not "absolutely need to be addressed by this Court" (*Mirzaee v Canada (Minister of Citizenship and Immigration)*, 2020 FC 972 at para 37). Therefore, the law-making function of this Court is not engaged (*David Suzuki Foundation v Canada (AG)*, 2019 FC 411 at para 123 [*David Suzuki*]).

[18] I find that the mootness issue is determinative of the application. In assessing whether a proceeding is moot, the Court must first determine whether the requisite tangible and concrete dispute has disappeared such that the issues have become academic. Second, if the answer to the first question is affirmative, the Court must ask whether it should nonetheless exercise its discretion to hear and decide the matter (*Borowski* at 353).

[19] I find that the first step in the mootness analysis has been satisfied and that the matter is clearly moot. The Applicant received disclosure prior to both the OIC's final report and to initiating this application for judicial review. Put another way, there was an event that occurred subsequent to the initiation of the proceeding that affected the relationship between the parties (*Borowski* at 353). As a result, there no longer remains a live controversy affecting, or potentially

affecting, the rights of the parties (*Borowski* at 354). Deciding whether the extension of time was lawful or reasonable will have no practical effect on such rights.

[20] Under the second step, the Court's exercise of discretion should be guided by three policy rationales: (a) the presence of an adversarial context; (b) the concern for judicial economy; and (c) the consideration of whether the Court would be encroaching upon the legislative sphere, rather than fulfilling its role as the adjudicative branch of government (*Borowski* at 358-63). The third rationale requires the Court to be aware of its proper law-making function (*Borowski* at 362; *Collin v Canada (AG)*, 2006 FC 544 at para 11 [*Collin*]).

[21] I am not persuaded that there is an adversarial relationship between the parties. Disclosure is no longer a live controversy, having been completed, and no other adversarial circumstance or collateral consequence arises (*Borowski* at 359-60).

[22] I am similarly unconvinced that "special circumstances" exist that "make it worthwhile to apply scarce judicial resources to resolve [the matter]" (*Borowski* at 360). As already noted, there will be no practical effect on the parties since disclosure has already been made. Furthermore, both *Khan* and *Constantinescu v Canada (Correctional Service)*, 2021 FC 229 [*Constantinescu*] were released after the 2019 amendments to the *Act*. In both cases, Justice Pamel confirmed that this Court does not have jurisdiction to review decisions when there is no longer a refusal to release records (*Khan* at para 28; *Constantinescu* at para 47). Implicit in these cases is the principle that "once the information has been provided, then there is no other remedy for the Court to provide" (*Frezza v Canada (National Defence)*, 2014 FC 32 at para 56 [*Frezza*]).

[23] Like the present case, *Khan* dealt with an extension of time under subsection 9(1) of the *Act*. While the applicants in *Khan* and *Constantinescu* did not specifically raise the 2019 amendments as an issue, Justice Pamel did consider pre-2019 case law and found that the principles developed under former section 41 remain applicable under subsection 41(1). In *Khan*, Justice Pamel opined:

> [27] In addition, I agree with the Prothonotary that since IRCC responded to the ATIP request on February 4, 2021, the underlying application would have no practical effect on the rights of the parties (*Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 at para 30).
>
> [28] In any event, I cannot see how the underlying application for judicial review has any chance of success. With the disclosure material having been provided to Mr. Khan on February 4, 2021, albeit after the expiry of the requisite time, there is no longer a refusal, whether deemed or otherwise, on the part of IRCC to disclose records in line with Mr. Khan's ATIP request—and without a live "refusal", this Court lacks jurisdiction to hear the matter. As I stated in *Constantinescu v Canada (Correctional Service)*, 2021 FC 229 at paragraph 47:
>
> > The case law of this Court is consistent to the effect that in the absence of a refusal to disclose and pursuant to section 41 of the ATIA (now subsection 41(1)), this Court does not have jurisdiction to review a decision of a government institution on a matter relating to an ATIA request; the refusal to disclose information is a condition precedent to an application under section 41of the ATIA (*X v Canada (Minister of National Defence)* (1991), 41 FTR 73 at para 10 [Re X]). As Justice Barnes observed in *Friesen v Canada (Health)*, 2017 FC 1152 at para 10 [Friesen], "[w]ithout exception, those decisions have held that the Federal Court can only provide relief to an applicant where there has been an unlawful refusal to disclose an identified record."

[24] Accordingly, I find that this Court has already ruled on the issue raised by the Applicant. Therefore, contrary to the Applicant's submissions, this issue is not novel nor "a question of public importance." In light of the case law cited above, there is no "uncertainty in the law" resulting in "social cost" that militates in favour of hearing this moot application (*Borowski* at 361-62). On the contrary, there is much jurisprudence from the Federal Court and Federal Court of Appeal interpreting former section 41 of the *Act*. Even when considering the 2019 amendments, the underlying rationale for declining to hear cases where there is no refusal or deemed refusal has not changed (*Frezza* at para 56).

[25] Finally, flowing from the analysis of the first two rationales, I find that third rationale is not engaged since "there is no question of great importance to be decided" (*Collin* at para 14; *David Suzuki* at para 126).

[26] Ultimately, none of the rationales discussed in *Borowski* exist in the present matter. The Court will not exercise its discretion to hear and decide the merits of this moot application. Having found this matter moot, it is not necessary to consider whether the time extension was reasonable.

[27] As a final point, even if I did not consider the matter moot, I would have found the Decision to extend the 30-day time limit to be reasonable. Subsection 9(1) of the *Act* does not prescribe the length of any extensions to the initial time limit. Rather, the provision requires that it be for a reasonable period of time, having regard to the circumstances set out in paragraphs (a), (b), or (c) (highlighted above). In the Decision, CBSA identified that meeting the original time

limit would unreasonably interfere with the operations of the Agency (*Act*, s 9(1)(a)). I do not read the *Act* as requiring a head of an institution to provide extensive reasons. The *Act* also appears to provide the head of an institution with some discretion in setting the additional timeframe it needs in order to comply with a request. In this particular case, 90 additional days is not an unreasonable amount of time.

## VI. Costs

[28] Both parties seek costs. The Respondent has not made fulsome submissions on costs. The Applicant submits that, although he is self-represented, he has incurred costs. The Applicant has had to produce documents, pay court fees, and put time and effort into his application. Pursuant to subsection 53(2) of the *Act*, the Applicant should receive costs because this matter raises "an important new principle" in relation to Part 1 of the *Act*. Namely, his claim to review an extension of the statutory time limit is novel in light of 2019 amendments to the *Act*. Alternatively, the Applicant submits that, pursuant to Rule 400(3)(h) of the *Federal Courts Rules*, SOR/98-106, costs should not be awarded against him due to the public interest in having this proceeding litigated.

[29] Subsection 53(1) of the *Act* provides that the costs of all proceedings in the Court under the *Act* shall be at the discretion of the Court and shall follow the event unless the Court orders otherwise. Further, subsection 53(2) of the *Act* provides that it is open to the Court to award costs to the Applicant, even if they have not been successful in the result, if it finds that the review proceeding "raised an important new principle in relation to [the Act]".

[30] The Federal Court of Appeal has explained that subsection 53(2) reflects "Parliament's intent that important issues concerning the Act be brought before the courts, and that a litigant who raises such issues is not to be deprived of an award of costs solely because he or she was unsuccessful in the litigation. The provision is an effort to level the playing field for litigants who seek records from a government institution" (*Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 at para 71 [*Statham*]).

[31] For the reasons already stated above, I do not agree with the Applicant that this application raises "an important new principle" as contemplated by subsection 53(2).

[32] *Dagg v Canada (Industry)*, 2010 FCA 316 [*Dagg*] and *Sheldon v Canada (Health)*, 2015 FC 1385 [*Sheldon*] are cases that consider the application of subsection 53(2) where the underlying dispute was found moot. In *Dagg*, the review proceeding was not moot when it was commenced, but was subsequently rendered moot when the relevant government agency responded to the access request. This was approximately 20 months after the initial access request was made. By that time, the applicant conceded that the matter was moot. The Federal Court of Appeal found that in these circumstances, the Federal Court should have ordered that Mr. Dagg was entitled to costs (at paras 4-5, 15). Likewise, in *Sheldon*, the proceeding only became moot after it was commenced. In that case, however, the applicant did not concede that the matter was moot. The Court distinguished *Dagg* on this basis and refused to award costs to either party (at paras 28-31).

[33] In comparison to the above cases, the present matter was moot before the review proceeding was first initiated. Additionally, similarly to *Sheldon*, the Applicant has not conceded that the matter is moot. Accordingly, I find it necessary to go further than *Sheldon* and award costs against the Applicant. To find otherwise would encourage parties with moot applications to initiate proceedings that do not raise an "in important new principle" in order to seek costs. This Court took a similar approach in *Khan*, where the self-represented applicant initiated a review proceeding after receiving disclosure. Initially, Prothonotary Ring (now Associate Judge Ring) awarded costs to the Respondent in the amount of $500. Later, on appeal, Justice Pamel awarded costs to the respondent in the amount of $1000 (*Khan* at para 33). Considering that this is the first time this Court is reviewing the present matter, I order costs against the Applicant fixed in the amount of $500.

## VII. Conclusion

[34] The application is dismissed for mootness. The Respondent is entitled to costs in the amount of $500.

**JUDGMENT in T-1309-21**

**THIS COURT'S JUDGMENT is that**:

1. The application for review of the Decision is dismissed.

2. The Applicant shall pay the Respondent costs fixed at $500.

"Paul Favel"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1309-21 |
| **STYLE OF CAUSE:** | ALEXANDRU-IOAN BURLACU v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 13, 2022 |
| **JUDGMENT AND REASONS:** | FAVEL J. |
| **DATED:** | SEPTEMBER 13, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Alexandru-Ioan Burlacu | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Adam Lupinacci | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |