Federal Court  Cour fédérale

Date: 20230529

Docket: T-891-21

Citation: 2023 FC 744

Ottawa, Ontario, May 29, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

JEAN-MARIE NAJM
ALSO KNOWN AS JOHNNY NAJM

Applicant

and

MINISTER OF INDIGENOUS SERVICES CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application under section 41 of the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*], relates to a statement of account and an invoice from a law firm to its client, a First Nation. These documents had been filed with Indigenous Services Canada [ISC] in support of a request made pursuant to the *Indian Act*, RSC 1985, c I-5, to access moneys held by the Crown. The documents were responsive to a request for access that Jean-Marie Najm made to

ISC because they contained reference to Mr. Najm's company, Omnia Oilfield Services Inc. However, a delegate of the Minister of Indigenous Services Canada concluded the records were confidential financial information and therefore exempt from disclosure under paragraph 20(1)(*b*) of the *ATIA*.

[2] For the reasons below, I conclude the documents are exempt from disclosure under paragraph 20(1)(*b*) of the *ATIA*, as the Minister found. The documents contained, and were, financial information of a third party that is confidential information supplied to ISC and treated consistently in a confidential manner by the third party.

[3] This application will therefore be dismissed. I also include in these reasons some observations on the process followed in this application, which hampered the ability of Mr. Najm's counsel to advise her client and prepare argument prior to the hearing of the application.

II. Issue, Standard of Review, and Burden

[4] The only issue on this application is whether the two records at issue are exempt from disclosure on the basis of paragraph 20(1)(*b*) of the *ATIA*. In answering this question, the Court conducts a *de novo* review, hearing and determining the matter as a new proceeding: *ATIA*, ss 41, 44.1; *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 at paras 13–14; *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 34–35. It is therefore not so much assessing whether the Minister correctly applied the exemption as reviewing the matter afresh to

determine whether the exemption applies, although the difference may be slight: *Preventous* at para 13, but see *Merck* at para 53, decided before the enactment of s 44.1.

[5] As the party seeking to uphold the exemption, the Minister bears the burden of proving, on a balance of probabilities, that the documents fall within an exemption to disclosure: *ATIA*, s 48(1); *Merck* at para 94.

III. Procedural Background

A. *The access request and ISC's response*

[6] On November 19, 2019, Mr. Najm made a request for access to documents containing information pertaining to himself in relation to communications between government public bodies. His request covered information pertaining to himself that would be on file under his full legal name, under certain aliases, or under the name of his company, Omnia.

[7] After internal consultations, ISC identified the two records at issue, which include reference to Omnia, as being responsive to the request. Internally, a number of potential grounds of exemption were identified, including confidential information from other governments (section 13 of the *ATIA*) and solicitor-client privilege (section 23 of the *ATIA*). However, ISC appears to have ultimately decided to only invoke paragraph 20(1)(*b*). ISC concluded that the exemption in paragraph 20(1)(*b*) applied without needing to consult with any third parties pursuant to section 27 of the *ATIA*.

[8] ISC responded to Mr. Najm's access request by letter dated February 5, 2020. That letter advised Mr. Najm that "[t]he records which were found to be relevant to your request have been withheld from disclosure pursuant to section 20(1)(b) of the [*ATIA*]." As required by subsection 10(1) of the *ATIA*, the letter also advised Mr. Najm that he was entitled to submit a complaint to the Information Commissioner. In a subsequent email exchange, the designated access officer at ISC confirmed that the records were not produced by the government, but by a third party who had shared them with ISC, and advised that they were "invoices, a collection of which only mention your company, Omnia, twice."

B. *The complaint to the Information Commissioner and investigation*

[9] Mr. Najm filed a complaint with the Information Commissioner on February 17, 2020. The investigation of the complaint was unfortunately delayed, first by the COVID-19 pandemic and then by staffing difficulties within ISC.

[10] After receiving representations from ISC and Mr. Najm, the Information Commissioner issued a final report dated April 15, 2021, concluding that the complaint was not well-founded because the information fell within the exemption in paragraph 20(1)(*b*) of the *ATIA*.

C. *This application for review*

[11] Mr. Najm commenced this application on June 3, 2021. As is common in applications under section 41 of the *ATIA*, Associate Judge (then Prothonotary) Coughlan issued a Confidentiality Order to ensure the records at issue were not disclosed during the course of the

proceeding, which would render the application moot: *ATIA*, s 47; *Bradwick Property Management Services Inc v Canada (National Revenue)*, 2016 FC 1056 at para 23 [*Bradwick (2016)*]. The Confidentiality Order provided that the records under review, and other documents disclosing their contents, were to be designated as confidential information, filed on an *ex parte* basis, and not made available to Mr. Najm.

[12] In accordance with the Confidentiality Order, ISC filed confidential and public versions of its materials on this application. The documents at issue were filed confidentially, as were submissions relating to their contents.

[13] It appears that neither Mr. Najm's former counsel nor counsel for the Minister asked that the Confidentiality Order include provision for the records to be provided to counsel on a confidential or "counsel's eyes only" basis, *i.e.*, without providing them to Mr. Najm. Nor did former counsel ask to be provided with copies of the records at issue on a counsel's eyes only basis. The result is that Mr. Najm's written submissions on whether the records were exempt under paragraph 20(1)(*b*) of the *ATIA* were prepared without counsel knowing what the records said or even what they were, beyond "invoices [that] mention your company, Omnia." When Mr. Najm's new counsel, Ms. Tuharsky, was retained, she considered that she was bound by the existing order, and similarly did not ask to be provided with copies of the records at issue or the Minister's confidential submissions on a counsel's eyes only basis.

[14] This became apparent at the outset of the hearing of this application, when the Court became aware that Ms. Tuharsky had not seen the records at issue. She had therefore been

required to prepare her oral submissions without knowing either what the documents were or important aspects of the Minister's arguments with respect to their exemption from disclosure. The Court questioned whether it was appropriate or fair in the circumstances for Ms. Tuharsky to attempt to present argument without knowledge of the documents or the Minister's arguments, and whether such a degree of secrecy was necessary given the nature of the documents in question. After discussion on the issue, Ms. Tuharsky requested that she be given access to the Minister's confidential record and submissions on a counsel's eyes only basis.

[15] The Minister's counsel, Ms. McHugh, appropriately consented to the request, conceding that in the circumstances of this case and based on Ms. Tuharsky's undertaking not to disclose them further, there was no reason for Ms. Tuharsky not to have copies of (i) the Minister's submissions; and (ii) the documents at issue with redactions to remove dollar amounts and confidential information in the statement of account and invoice that was irrelevant to Mr. Najm's request and to this proceeding. Ms. McHugh also appropriately conceded that although the Minister's written argument had redacted the fact that the records were legal invoices from a law firm to a First Nation, that fact was not in itself confidential and could be discussed publicly and revealed to Mr. Najm without reference to the particular law firm or client.

[16] The hearing was therefore adjourned to permit Ms. McHugh and her team to prepare these versions for Ms. Tuharsky, and for Ms. Tuharsky to be able to review them and refine her arguments accordingly. Ms. Tuharsky's subsequent submissions made clear that, upon seeing the records at issue for the first time, she was surprised by the fact that they were legal invoices.

[17] I recite the foregoing procedural history to underscore the importance, in proceedings such as this, of ensuring that applicants and their counsel are provided with as much information as will permit them to appropriately argue the matter, consistent with the principle set out in section 47 of the *ATIA*, that proceedings should be conducted so to avoid the disclosure of records or information whose exemption from disclosure is at issue.

[18] As Prothonotary Aylen, as she then was, noted in *Bradwick (2016)*, while confidentiality orders are common in proceedings under the *ATIA*, the Court seeks to strike a proper balance between openness and confidentiality: *Bradwick (2016)* at para 25. One of the mechanisms aimed at doing so is to permit an applicant's counsel, in the appropriate case, to have access to the information protected by a confidentiality order, or if such disclosure is inappropriate given the nature of the records, to at least a "minimum standard of disclosure" of information sufficient to permit them to present "intelligent debate on the question of its disclosure": *Bradwick (2016)* at paras 25–30, citing *Hunter v Canada (Consumer and Corporate Affairs) (CA)*, [1991] 3 FC 186 (CA) at pp 206, 211–212.

[19] In the present case, earlier disclosure to counsel, or an earlier request by counsel for such disclosure, may have narrowed the issues and may even have resulted in resolution of the matter. It would certainly have permitted Ms. Tuharsky and Mr. Najm's former counsel to better advise Mr. Najm regarding the issues and the reasons given for exemption.

[20] I note for clarity that I do not criticize any of the counsel involved for their conduct of the proceeding or for their interpretation of the Confidentiality Order. I simply reiterate that it is

important for counsel in proceedings under the *ATIA* to proactively consider the process, to ensure it is designed to permit applicants and their counsel to understand the issues and present their case.

[21] With these comments on the procedural aspect, I turn to the merits of Mr. Najm's application.

IV. Analysis

A. *Paragraph 20(1)(*b*) of the* Access to Information Act

[22] Paragraph 20(1)(*b*) of the *ATIA* provides for a mandatory exemption from disclosure for certain third party confidential information:

Third party information	Renseignements de tiers
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains	20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
[…]	[…]
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[23] As the parties agree, records are only exempt under paragraph 20(1)(*b*) where they contain information that is (i) financial, commercial, scientific, or technical information; (ii) confidential and consistently treated in a confidential manner by the third party; and (iii) supplied to a government institution by a third party: *Merck* at para 133, citing *Air Atonabee Ltd v Canada (Minister of Transport)*, 1989 CarswellNat 585 at para 34, [1989] FCJ No 453 (TD); *Bombardier Inc v Canada (Attorney General)*, 2019 FC 207 at para 43. Each of these criteria must be met for the exemption to apply. Once it is established that they all apply, the exemption applies as a class-based exemption: *Bombardier* at paras 42, 44.

[24] Mr. Najm does not dispute that the statement of account and invoice at issue constitute financial information, or that they were supplied to ISC by a third party. I agree that each of these requirements is met. However, he contends that the Minister has not met their burden to show that the documents are confidential and consistently treated in a confidential manner by the third party.

B. *The records are confidential*

[25] Whether information is confidential is assessed on an objective standard taking into account its content, purpose, and the conditions under which it was prepared and communicated: *Air Atonabee* at para 37, citing *Montana Band of Indians v Canada (Minister of Indian Affairs & Northern Development)*, [1989] 1 FC 143 at p 158, 1988 CarswellNat 1202 at para 29. This includes consideration of whether the information is available from other sources; whether it originates and is communicated in a reasonable expectation of confidence; and whether the information was communicated to the government, either by requirement or gratuitously, in a

relationship that will be fostered for public benefit by confidential communication: *Air Atonabee* at paras 42–45.

[26] In my view, the documents on their face are objectively confidential. With respect to their content, purpose, and the conditions in which they were prepared, the documents consist of a statement of account and an invoice issued by a law firm to its client as part of their solicitor-client relationship. The Supreme Court of Canada has recognized that lawyers' bills of account are presumptively subject to solicitor-client privilege and confidential: *Maranda v Richer*, 2003 SCC 67 at paras 31–34. There is nothing to rebut that presumption in the present case. To the contrary, the statement of account is marked "CONFIDENTIAL." While the invoice does not have a similar marking, it expressly refers to the various professional services rendered by the firm to the client.

[27] I open a parenthesis to note that while the *ATIA* contains a separate provision, section 23, exempting from disclosure records that are subject to solicitor-client privilege, the Minister in this case is relying solely on paragraph 20(1)(*b*). This does not, in my view, preclude the Minister from relying on the privileged nature of the documents to assert their confidentiality. Indeed, the existence and protection of solicitor-client privilege is predicated on confidentiality: *Maranda* at paras 11–12. While the records might also be exempt pursuant to section 23 of the *ATIA*, the potential applicability of that section does not mean paragraph 20(1)(*b*) cannot apply, as multiple exemptions may potentially apply to the same information or records: *Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at para 49; *Imai v Canada (Foreign Affairs)*, 2021 FC 1479 at paras 13–14.

[28] With respect to the conditions in which the documents were communicated, while the evidence could have been clearer on the point, it shows that the statement of account and invoice were submitted to ISC under the *Indian Act* in order to access funds held by the Crown. A similar context arose in *Montana Band*, where the records at issue were audited financial statements: *Montana Band* at pp 145–147, paras 2, 6. In finding that the records were exempt from disclosure under paragraph 20(1)(*b*), Associate Chief Justice Jerome noted that the funds were held by the federal government for the Bands "[b]y a complex series of historical and constitutional developments," which created a fiduciary relationship in which financial information passes subject to a "duty of confidence": *Montana Band* at p 158, para 30; see also *Alderville First Nation v Canada*, 2017 FC 631 at paras 46, 51, 71.

[29] This confidential treatment is confirmed in the "Manual for the Administration of Band Moneys" issued by the Minister, which contains provisions relating to access under the *ATIA* to information and records related to trust moneys. Although the Manual itself was not filed on this application, relevant sections were reproduced by ISC when providing representations to the Information Commissioner. The Manual provides that ISC can only release such records to someone other than the Band council upon submission of written consent from the Band council in the form of a Band council resolution. This provision confirms the expectation of confidentiality that covers records submitted to ISC in connection with requests for moneys held by the Crown. Further, I am satisfied that this relationship is one that will be fostered for public benefit by confidential communication: *Alderville* at paras 59, 71.

[30] Mr. Najm submitted that privilege over the documents may have been waived, either independently or through their submission to ISC. With respect to the possibility that privilege or confidentiality over the records may have been waived through some other unknown circumstances, such as communication to a third party, there is no evidentiary basis for this suggestion. With respect to the submission to ISC, the submission of legal invoices to ISC to access funds held by the Crown under the *Indian Act* does not appear to me to constitute a waiver of privilege: see, *e.g.*, *Boudreau v Loba Limited*, 2015 ONSC 4877 at paras 21–22, citing *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860 at p 879 and Adam Dodek, *Solicitor-Client Privilege*, (Toronto: LexisNexis, 2014) at pp 138, 247–250. In any event, even if submitting the account and invoice constituted a waiver of privilege, which I question, it does not involve a waiver of confidentiality, which is the issue for purposes of paragraph 20(1)(*b*): *Montana Band* at p 159, para 35.

[31] There is nothing to suggest the information in the statement of account and invoice is available from other sources. While Mr. Najm suggests that some First Nations make such records available to their membership, there is no evidence of this on the record, either as a general matter or with respect to these particular records. In any case, as Associate Chief Justice Jerome noted, "confidentiality is not destroyed by the Band Council's responsibility to report to its members": *Montana Band* at p 158, para 31.

[32] Mr. Najm raises the additional argument that the records are not confidential since he was advised by the investigator at the Office of the Information Commissioner that he could obtain them through a request under the *Privacy Act*, RSC 1985, c P-21, which does not have a third

party exemption. He contends that if he could obtain the records under the *Privacy Act*, they cannot be confidential. I cannot accept this submission for two reasons. First, all that the investigator told Mr. Najm was that if he was "concerned about ISC withholding [his] personal information," which was one of the concerns raised by Mr. Najm, then "one option could be that [he] could make the same request under the *Privacy Act*." Such a suggestion in no way affects the confidential nature of the records at issue, which do not in fact contain any personal information of Mr. Najm.

[33] Second, a request under sections 12 and 13 of the *Privacy Act* allows an individual to access personal information about themselves. Such information is disclosed only to the person requesting it and that disclosure does not make the information available to any requester who might make a request for access under the *ATIA*. A request under the *ATIA*, on the other hand, is essentially requester-neutral; whether something is exempt from disclosure generally does not depend on the identity of the requester, which may itself remain confidential: *Toronto Sun Wah Trading Inc v Canada (Attorney General)*, 2008 FCA 239 at para 17, leave to appeal ref'd 2008 CanLII 67842 (SCC); *John Doe v Ontario (Finance)*, 2014 SCC 36; *ATIA*, s 4(2.1). This fundamental difference between requests under the *Privacy Act* and those under the *ATIA* are such that even if information could potentially be obtained pursuant to a *Privacy Act* request, it does not mean that the information is appropriately disclosed under the *ATIA*. I note that there was no suggestion or evidence that Mr. Najm is a member of the First Nation that is the client referred to in the records, such that it might trigger application of the "very unusual circumstances" described in *Canada (Indian Affairs and Northern Development) v Sawridge Band*, 2009 FCA 245 at paras 31–36, leave to appeal ref'd 2010 CanLII 20569 (SCC).

[34] For the foregoing reasons, I conclude that the documents are objectively confidential in nature.

C. *The records have consistently been treated confidentially*

[35] The manner in which this application arose makes it somewhat more difficult to assess the requirement in paragraph 20(1)(*b*) that the records have been "treated consistently in a confidential manner by the third party." Most matters involving determinations under paragraph 20(1)(*b*) arise under section 44 of the *ATIA*, rather than section 41. That is to say, they arise when a third party seeks review of a decision of the head of a government institution to disclose a record, after they have been given notice under section 27 and an opportunity to make submissions under section 28: see, *e.g.*, *Merck* at paras 28, 30–34, 53; *Air Atonabee* at paras 1, 5–9; *Bombardier* at paras 1, 4; *Montana Band* at pp 145–146, para 2; *Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2021 FC 138 at paras 1–2, 18–41, 88–96; *Concord Premium Meats Ltd v Canada (Food Inspection Agency)*, 2020 FC 1166 at paras 1–2, 12–16.

[36] However, the *ATIA* only requires notice to a third party where the head of a government institution intends to disclose a record that the head has reason to believe might contain information described in subsection 20(1): *ATIA*, s 27(1). As the Supreme Court confirmed in *Merck*, the *ATIA* recognizes that the head of a government institution may decide that a subsection 20(1) exemption applies without needing third party representations; no notice to the third party is required in such a case: *Merck* at paras 64–69, 73, citing *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at paras 41, 66; *Imai* at para 85. As Justice

Cromwell stated for the majority of the Court, an institutional head "should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure" [emphasis in original]: *Merck* at para 84(ii).

[37] The result is that if the requester complains to the Information Commissioner and subsequently brings an application for review pursuant to section 41, the head of the government institution may not have received representations from the third party, and the Court may not have evidence from the third party: see, *e.g.*, *Imai* at para 82; *Bradwick Property Management Services Inc v Canada (National Revenue)*, 2019 FC 289 at paras 8, 80–83 [*Bradwick (2019)*], aff'd 2020 FCA 147.

[38] This changes neither the standard of review nor the onus on the government institution to demonstrate that the exemption applies: *Imai* at paras 80, 85; *Bradwick (2019)* at para 72. However, in such circumstances, the Court may have to draw inferences from the evidence in the record, including as to the nature of the documents and the circumstances, to assess whether the requirements of the applicable exemption are present. For example, in *Imai*, Justice Pamel considered the exemption in paragraph 20(1)(*c*) of the *ATIA* and concluded on his review of the information in the document that it was "self-evident" that disclosure would compromise the third party's competitive position: *Imai* at para 85. Similarly, in *Bradwick (2019)*, Justice Locke, then of this Court, had no evidence from the third party, but inferred that a letter to the Canada Revenue Agency was treated consistently in a confidential manner, despite other letters not being

so treated: *Bradwick (2019)* at para 82; see also *Rubin v Canada (Minister of Health)*, 2001 FCT 929 at paras 44–49, aff'd 2003 FCA 37 at paras 3–5.

[39] In the present case, as noted above, neither the First Nation nor their lawyer was provided with notice pursuant to section 27 of the *ATIA*. From this, one can conclude that ISC found that the information was "clearly exempt": *Merck* at para 84(ii). As a result, I have no evidence or representations directly from either the First Nation or the lawyer stating that they have consistently treated the statement of account or invoice in a confidential manner. Indeed, there is nothing before me to suggest that either the First Nation or the lawyer is even aware of these proceedings.

[40] Nonetheless, given the particular nature of the documents; the fact they are presumptively subject to solicitor-client privilege; the general ethical obligations on counsel to strictly preserve the confidentiality of information regarding their client; the specific circumstances in which the records were provided to ISC; and the absence of any evidence to indicate that privilege or confidentiality was waived or the records released, I am satisfied the Minister has met their burden to show the records were treated consistently in a confidential manner.

D. *The records are exempt from disclosure and are not severable*

[41] As the records meet all the criteria of paragraph 20(1)(*b*), I conclude the Minister was correct to find that the statement of account and invoice were exempt from disclosure.

[42] Even where some material in a record is exempt from disclosure, the head of a government institution must disclose any part of the record that "does not contain, and can reasonably be severed from" the exempt material: *ATIA*, s 25. In the present case, the entirety of the records are presumptively privileged and not subject to release. In any event, severing any confidential information from the records would result in nothing more than "disconnected snippets" that are "devoid of meaning": *Merck* at para 237, citing *Canada (Information Commissioner) v Canada (Solicitor General)*, [1988] 3 FC 551 (TD) at pp 558–559. I note that Mr. Najm's counsel, having had the opportunity to review the records, did not stress the potential for severing portions of the records for release. I conclude there is no material that can be reasonably severed from the records for disclosure.

V. Other Issues Raised in the Application

[43] For completeness, I note that Mr. Najm's notice of application, prepared by his former counsel, also seeks to challenge two other decisions. Neither is appropriately the subject of this application. The first is the Information Commissioner's report finding Mr. Najm's complaint to be not well-founded. However, a review under section 41 of the *ATIA* is not a judicial review of the Information Commissioner's report but rather a review of whether the information requested should be disclosed to the requester: *Preventous* at para 13; *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142 at para 44; *Lambert v Canada (Canadian Heritage)*, 2022 FC 553 at para 22.

[44] The second is said to be a decision by the Information Commissioner allowing the head of a public institution to seek an order under subsection 41.2(1) of the *ATIA*. This appears to

relate to a statement made by the investigator at the Office of the Information Commissioner while they were awaiting representations from ISC. The investigator advised Mr. Najm that "[p]er subsection 41.2(1) of the [*ATIA*], if a third party chooses to seek a review, any other party who has received the final report (you as the complainant and the government institution) would appear as a party to the review." It appears that Mr. Najm or his former counsel misunderstood this advice as indicating that the Information Commissioner gave ISC some form of permission to seek an order withholding approval without first obtaining representations from him.

[45] This is not correct. All that the investigator appears to have been doing was trying to assist Mr. Najm by explaining the process related to reviews under the *ATIA*. Subsection 41.2(1) of the *ATIA* simply provides that if someone who receives a report from the Information Commissioner (in this case, Mr. Najm) starts an application for review in this Court, that any other person who receives the report (in this case, ISC) has the right to appear as a party. That right is set out in the statute, and is not the result of any decision or permission granted by the Information Commissioner. It is possible that the circumstances in which the investigator referred to this section, namely in response to Mr. Najm's questions about the Information Commissioner's review of the disclosure, may have added to confusion. However, there was no decision or permission in the investigator's statement that can possibly be subject to judicial review in this Court.

[46] Further, in his affidavit, Mr. Najm also raised a concern that ISC was hiding or withholding documents. However, beyond referring to this general concern, Mr. Najm made no submissions on this point. Rather, his submissions focused on the application of

paragraph 20(1)(*b*) of the *ATIA*. The Court is thus not called upon to decide whether there may be other records held by ISC or by Crown-Indigenous Relations and Northern Affairs Canada responsive to Mr. Najm's access request.

[47] Finally, a word about remedy. Mr. Najm's notice of application and written submissions asked that I direct the release of the records. The Minister argued that even if I found they had not met their burden to show that paragraph 20(1)(*b*) applied, the records should not be released without the third parties being given an opportunity to make representations or present information with respect to confidentiality. In oral submissions, Mr. Najm accepted the merit of this concern. Although I need not decide the issue given my conclusion that the exemption applies, I would have been reluctant in these circumstances—where the third party had no prior notification and no opportunity to provide information and representations regarding release of the records—to simply order release without the third party having that opportunity. This would particularly be the case if the decision had been, for example, that there was insufficient evidence going to the requirements of the exemption.

VI. Conclusion

[48] As the two records at issue are both subject to the exemption from disclosure set out in paragraph 20(1)(*b*) of the *ATIA*, this application is dismissed.

[49] The Minister indicated that, if successful, they would not seek costs. No costs are awarded.

JUDGMENT IN T-891-21

THIS COURT'S JUDGMENT is that

1. The application for review is dismissed, without costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-891-21
STYLE OF CAUSE:	JEAN-MARIE NAJM AKA JOHNNY NAJM v MINISTER OF INDIGENOUS SERVICES CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 5, 2023
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MAY 29, 2023

APPEARANCES:

Connie J.M. Tuharsky	FOR THE APPLICANT
Sydney McHugh	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rath & Company Foothills, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT