Date: 20071004

Docket: T-230-06

Citation: 2007 FC 1022

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 4, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GABRIEL FONTAINE

Applicant

and

THE ROYAL CANADIAN MOUNTED POLICE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for review under section 41 of the *Access to Information Act*, R.S.C, 1985, c. A-1 (the Act), regarding the decision by the Royal Canadian Mounted Police (the RCMP) to refuse to disclose certain documents that were part of an access to information request submitted by the applicant.

The facts

[2] On or around March 6, 2004, the RCMP received an access to information request in which Gabriel Fontaine (the applicant) requested the disclosure of a continuation report in an investigation file that was opened on him on December 5, 1988.

[3] The continuation reports from the RCMP were prepared as part of an investigation that was launched by them following a complaint filed in December 1988 regarding criminal acts that were attributed to the applicant. Those reports are used as a management tool by members of the RCMP who are involved in the investigation to document their efforts; they describe the facts and actions of the investigators, their conversations, interviews, meetings, and their observations as part of the investigation. The evidence obtained following that investigation led to the laying of criminal charges against the applicant, who pleaded guilty to three charges of fraud on the government before the Court of Québec (Criminal and Penal Division) in July 1999.

[4] In a letter dated November 2, 2004, the RCMP sent the applicant the relevant information that it considered it was able to communicate to him by the terms of the Act, telling him that certain other items of information could not be disclosed to him, as they are subject to an exemption set forth in the subparagraph and indicated that exemptions under sections 16(1), 19(1) and 23 of the Act may also apply to certain information.

[5] On November 15, 2004, the applicant disputed the RCMP's refusal regarding the information that was not provided by contacting the Information Commissioner of Canada (the Commissioner).

[6] In a letter dated January 10, 2006, the Commissioner informed the applicant that his investigation had led him to find that the RCMP was justified in refusing to disclose the requested documents, by the terms of sections 16, 19 and 23 of the Act.

[7] On February 8, 2006, the applicant filed an application for review with this Court, under section 41 of the Act, in order to set aside the Commissioner's decision.

[8] Following the Court order dated March 16, 2007, the respondent filed a public record and a confidential record. All the documents, including those for which disclosure to the applicant was refused, were therefore filed with the Court. They were included as an appendix to the confidential sworn statement from the RCMP's Access to Information and Privacy Coordinator (the Coordinator).

Issue

[9] The only issue is the following:

> Was the RCMP able to refuse to disclose the documents that were in the applicant's access to information request?

General principles

[10] The purpose of the Act is to promote the disclosure of documents controlled by the federal public service by providing a general right to access for the benefit of Canadian citizens and permanent residents. In access to information matters, the disclosure of information is the rule (*Rubin v. Canada*, [1989] 1 FC 265 (C.A.). However, this right to disclosure is not absolute and Parliament has set forth two types exceptions to that right: mandatory exceptions and discretionary exceptions.

[11] Mandatory exceptions, such as those set forth under sections 13, 20 and 24 of the Act, for example, oblige the government not to disclose the requested information. As soon as the federal institution is satisfied that the information qualifies for the invoked exception, it must refuse to send it.

[12] Discretionary exceptions, for example, those set forth under sections 14 to 16, and 21 to 23 of the Act, gives the federal institution the obligation to conduct an analysis, which likely consists of two steps.

[13] In *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147 aff. by (1993), 154 N.R. 319 (FCA), Barry Strayer J. explained the decision-making process as follows:

> […] these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.

[14] In this case, the RCMP refused to send the requested documents under the terms of subparagraph 16(1)(*a*)(i), and sections 19 and 23 of the Act.

[15] The relevant provisions are reproduced in the Appendix.

The standard of review

[16] When a federal institution refuses to send a document and the Information Commissioner rejects the applicant's complaint regarding this refusal, the applicant can apply for review by the Federal Court in compliance with section 41 of the Act.

[17] When the Court is called upon to review a decision dealing with the application of a mandatory exception, it acts de novo. It may then substitute its assessment for that of the federal institution, (*Dagg v. Canada*, [1997] 2 SCR 403, at page 62.

[18] Moreover, when this is a review of a decision dealing with a discretionary type of exception, the process is set forth in two steps: The court acts *de novo* in the first step: it determines whether the requested information is identified by the exception. If such is the case, the second step consists of ensuring that the refusal to disclose the information stems from a legal exercise of discretionary authority. As follows, Strayer J. summarized how to proceed with the review in *Kelly*, above, at paras. 6 and 7:

> The first type of factual decision is one which, I believe, the Court can review and in respect of which it can substitute its own conclusion. This is subject to the need, I believe, for a measure of deference to the decisions of those whose institutional responsibilities put them in a better position to judge the matter. […]
>
> The second type of decision is purely discretionary. In my view in reviewing such a decision the Court should not itself attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted. […]

Those remarks were cited with approval by La Forest J. in Dagg, *above*.

[19] In *3430901 Canada Inc. v. Canada (Minister of Industry)* [2002] 1 FC 421, leave for appeal before the SCC, refused [2001] S.C.C.A. no. 537 (*Telezone*) at paragraph 47, the Court of Appeal thus summarized:

> In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption. However, when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness. […]

To that same end, *Thurlow v. Canada (Solicitor General)*, 2003 FC 1414, [2003] FCJ no. 1802 (QL) and *Elomari v. President of the Canadian Space Agency*, 2006 FC 863.

Analysis

1. Subparagraph 16(1)(*a*)(i)

[20] Paragraph 16(1)(*a*) provides a discretionary exception. There are three conditions for a document to qualify for that exception:

1) the document must be dated from less than 20 years ago;
2) it must contain information that was prepared or obtained by any government institution, or part of any government institution, that is an investigative body specified in the regulations;
3) the documents must have been obtained or prepared by that institution as part of lawful investigations pertaining to the detection, prevention or suppression of crime.

[21] After having carefully reviewed the documents in question, I am satisfied that they date from less than 20 years ago and were prepared by the RCMP as part of an investigation aimed at determining whether an offence had been committed by the applicant. Lastly, the RCMP is an investigative body within the meaning of section 9 of the *Access to Information Regulations* (according to paragraph 6 of Schedule I of that regulation).

[22] The information that the respondent, at its discretion, considered appropriate to keep confidential are essentially information that reveal the identity of its information sources, that is, persons who made complaints against the applicant, who collaborated or who were interrogated by investigators as part of their investigation pertaining to the detection and suppression of crime.

[23] Since the RCMP correctly described them, it was able to refuse to send them. Therefore, it is for the Court to review the exercise of discretionary power in order to ensure that it was reasonable.

[24] The RCMP found that it was important to keep the identity of its sources confidential in order to promote the public's cooperation in its investigations. In addition, in order to maintain and foster the bond of trust that binds provincial organizations, the RCMP believes that it was preferable to keep the documents that it obtained from those organizations confidential.

[25] I found that those reasons were reasonable. Parliament decided to allow certain organizations that are responsible for conducting investigations, including the RCMP, to keep confidential any documents that were obtained or prepared as part of investigations aimed at, in particular, the detection and suppression of crime. The Court cannot find that the respondent exercised its discretionary power inappropriately and there is no indication that would allow this Court to find that it acted in bad faith.

2. <u>Section 19 of the Act</u>

[26] In light of that provision, which provides a mandatory exception to its first subsection and a discretionary exception to its second, I am adopting the findings of Heald J. in *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration*), [1996] 1 FC 268, [1995] FCJ no. 1456 (QL) (TD) at paragraph 27, which at its basis, the exemption set forth in section 19 is a discretionary exemption in cases where the exemptions set forth in subsection 19(2) apply, that is, in

which the individual to whom the documents relate consents to the disclosure, the information is publicly available, or the disclosure is in accordance with section 8 of the *Privacy Act* (the PA).

[27] As a result, the RCMP has the obligation to establish whether the requested information is "personal information" identified by section 3 of the PA. (*Sutherland v. Canada (Minister of Indian and Northern Affairs*), [1994] 3 FC 527, 77 F.T.R. 241 (TD)). Once the evidence is made, it falls to the applicant to establish whether one of the exceptions set forth under paragraphs 3(*j*) to 3(*m*) apply (*Jewish Congress*, above, at paras 29, 30).

[28] The review of the documents at issue allows this Court to find that this is personal information within the meaning of section 3 of the PA and that none of the exceptions in paragraphs 3(*m*) to 3(*j*) of the PA apply.

[29] As for the exception according to paragraph 8(2)(*m*) of the PA and paragraph 19(2)(*c*) of the Act, the applicant has made no argument regarding a public interest that would justify violation of the individual right to privacy mentioned in the undisclosed information.

[30] In this case, the respondent submitted that it did not exercise its discretionary power because it was of the view that none of the exceptions set forth under subsection 19(2) of the Act were applicable.

[31] I share the respondent's opinion in that regard. Since subsection 19(2) of the Act did not apply, the RCMP was required to refuse to disclose the requested information under subsection 19(1) of the Act as a mandatory exception. After having reviewed the documents and excerpts of documents that were refused for that matter**,** I have found that the RCMP was correct to refuse to disclose them.

3. Section 23 of the Act

[32] Notwithstanding the application of exceptions in accordance with subsection 16(1) and section 19 of the Act, the RCMP also believed that certain documents in question qualified under section 23 of the Act and were not to be disclosed.

[33] Section 23 of the Act allows a government institution to refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

[34] Case law recognizes that the justice system depends on full, free and frank communication between those who need legal advice and the solicitor. The resulting confidential relationship between solicitor and client is a necessary and essential conditions of the effective administration of

justice (*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] SCR no. 39 at par. 26 [*Blank* SCC]).

[35] The majority of the Court in *Blank* SCC, above**,** recognized that solicitor-client privilege, which is in question in section 23 of the Act, includes both the legal advice privilege and the litigation privilege. However, the majority of the court indicated that it is preferable to recognize that these are distinct concepts and not two components of the same concept. The protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice, and to obtain proper candid legal advice.

[36] Solicitor-client privilege applies to confidential communications between the client and his solicitor; it exists each time a client consults his solicitor, whether regarding litigation or not. It extends to any document created to be sent to a solicitor to obtain advice or allow him to prosecute or defend against an action, including documents from third parties.

[37] Additionally, in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31, the Supreme Court found in paragraph 19 that solicitor-client privilege "has been held to arise when in-house government lawyers provide legal advice to their client, a government agency".

[38] However, litigation privilege is directly adapted to the litigation process; it is not directed at, still less, restricted to, communication between solicitor and client. It also affects communications

between a solicitor and third parties, and the purpose of that privilege is to create an area of confidentiality at the time of or in anticipation of litigation. Litigation privilege should be attached to documents created mainly for litigation, and should be considered as an exception to the principle of full communication and not as a parallel concept that is equal to solicitor-client privilege interpreted in the broad sense of the term, *Blank*, above.

[39] The applicable principles for determining whether a document falls under solicitor-client privilege are those that are developed for that purpose by *common law* (*Blank* SCC, above, at par. 26**;** Jewish Congress, above), namely:

- it must be a consultation or exchange with a client;
- the consultation or exchange must have been intended to be confidential;
- the solicitor's contribution must be sought out due to having the description of a solicitor;
- The consultation or exchange must not be for the purpose of achieving illegal goals.

(*R. v Campbell*, [1999] 1 SCR 565 at par 49; see also *Canada v. Solosky*, [1980] 1 SCR 821.

[40] In the first case, after having reviewed the documents for which solicitor-client privilege was involved, aside from a few documents that more specifically affect litigation privilege and that follow the Supreme Court decision in *Blank* would no longer be privileged because the litigation is over, I am of the view that they fall under solicitor-client privilege. As for the other documents that

refer to the dispute, those also qualify under paragraph 16(1)(*a*), such that it was correct for them not to be sent.

[41] Once again, I did not find any evidence that the respondent exercised its discretionary power irregularly or in bad faith. Therefore, I affirm the respondent's decision to refuse the disclosure of those documents.

[42] For those reasons, this application for review under section 41 of the Act is dismissed.

JUDGMENT

THE COURT ORDERS that this application for review be dismissed.

"Danièle Tremblay-Lamer"
Judge

APPENDIX

Access to Information Act **(R.S.C., 1985, c. A-1)**

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

[…]

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution. […]

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

(*a*) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the record came into existence less than twenty years prior to the request;

(*b*) information relating to investigative techniques or plans for specific lawful investigations;

(*c*) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

(*d*) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions. […]

Definition of ***investigation***

(4) For the purposes of paragraphs (1)(*b*) and (*c*), ***investigation*** means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

[…]

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act 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*. […]

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

[…]

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Privacy Act **(R.S.C., 1985, c. P-21)**

3.

[…]

personal information means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

[…]

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the

contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*l*) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(*m*) information about an individual who has been dead for more than twenty years;

[…]

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(*c*) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(*d*) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(*e*) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(*g*) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(*h*) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(*i*) to the Library and Archives of Canada for archival purposes;

(*j*) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(*l*) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-230-06
STYLE OF CAUSE:	**GABRIEL FONTAINE** **Applicant** **and** **THE ROYAL CANADIAN MOUNTED POLICE** **Respondent**
PLACE OF HEARING:	Québec City
DATE OF HEARING:	September 20, 2007
REASONS FOR JUDGMENT:	TREMBLAY-LAMER J.
DATED:	October 4, 2007

APPEARANCES:

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Marie Josée Bertrand Per: Justice Canada	FOR THE RESPONDENT

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