

**Date: 20080430**

**Docket: DES-2-08**

**Citation: 2008 FC 560**

**Ottawa, Ontario, April 30, 2008**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**MOHAMMED MOMIN KHAWAJA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] In Reasons for Decision issued on May 7, 2007 and Amended Public and Private Orders issued on May 28, 2007 this Court dealt with an application brought by the Attorney General of Canada in respect of information addressed in two notices served on the Attorney General under subsection 38.01(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the Act) in the underlying criminal proceedings against the respondent: *Canada (Attorney General) v. Khawaja* 2007 FC 490, [2007] F.C.J. No. 622.

[2] The Amended Public and Private Orders of May 28, 2007 were appealed by the Attorney General and cross-appealed by the respondent. In a decision released on October 31, 2007 the Federal Court of Appeal allowed the Attorney General's appeal in part and dismissed the cross-appeal. The Court of Appeal concluded that the descriptive summary of the documents in Schedule "A" to the Amended Private Order contained some information the release of which would be injurious or potentially injurious to the interests protected by section 38 of the Act and had not been authorized. The Court therefore allowed the appeal to the extent necessary to substitute a revised Schedule "A" subject to the same terms and conditions as the original: *Canada (Attorney General) v. Khawaja*, 2007 FCA 342, [2007] F.C.J. No. 1473.

[3] This is a fresh application under subsection 38.04(1) of the Act for an order regarding disclosure of information with respect to which counsel for the Public Prosecution Service of Canada in the matter of *R. v. Khawaja* in the Superior Court of Justice (Ontario) has served notice on the Attorney General of Canada under subsection 38.01 (1). The application was initially filed on February 1, 2008. Amended versions were filed on February 27, 2008 and again on April 18, 2008.

[4] As amended, the Notice of Application addresses four notices to the Attorney General by the prosecutor dated December 19, 2007, February 1, 2008, February 19, 2008 and April 2, 2008. With respect to each of these notices, the Attorney General has notified the prosecutor of his decision not to authorize disclosure of some of the information addressed in the notices and to authorize disclosure of the fact that application has been made to the Federal Court under section 38.04 of the Act.

[5] By Order dated February 8, 2008, by which Mr. Khawaja was formally designated as respondent, it was determined that a hearing would be necessary; the applicant was authorized to serve notice of the proceeding on the trial judge in the Ontario Superior Court of Justice; and, a date was fixed for the applicant to file and serve any public evidence and file any private evidence that he wished to submit. Public affidavit evidence was filed and served by the applicant on February 15, 2008 and February 27, 2008. Private (*ex parte*) affidavit evidence was filed on those dates and again on April 11, 2008.

[6] A series of teleconferences were held with counsel for the parties to discuss preliminary matters and the procedures to be followed on this application. Counsel for the respondent made a motion for the appointment of an *amicus curiae* to assist the court in preparing for and to participate in the *ex parte* hearings of evidence. An Order was issued on April 3, 2008 appointing Mr. Leonard Shore, Q.C. as *amicus*. Mr. Shore had access to each of the documents in question and cross examined each of the witnesses presented by the applicant during the *ex parte* hearings which took place on April 15 and 18, 2008.

[7] As presented to the Court in the February 15, 2008 affidavits, the application dealt with 12 documents that had been collected for disclosure purposes following the release of the decisions in the preceding application. An additional 11 documents were the subject of the February 27, 2008 affidavits and 9 were included as exhibits to the April 11, 2008 affidavits. The information which the Attorney General sought to protect in the documents had been collected by the Royal Canadian Mounted Police (RCMP).

[8] In the course of the proceedings, a witness identified some information which no longer needed to be protected. In addition, a foreign agency agreed to the release of certain information which had been provided under caveat. By letter dated April 29, 2008 counsel for the applicant advised the Court that the Attorney General had authorized the disclosure of additional information. Unredacted copies of the pages in question were served on the respondent and filed with the Court the same date. In the result, the scope of the information which the Court had to address on this application was reduced.

[9] A three stage test is applied to decide whether the Court should confirm the Attorney General's decision not to authorize disclosure: *Canada (Attorney General) v. Ribic*, 2003 FCA 246, [2003] F.C.J. No. 1964. The first stage is to determine whether the information at issue is relevant to the underlying proceedings. When those proceedings are criminal in nature, as here, the test of relevance is the same as the low threshold which applies to the prosecution's continuing obligation to provide disclosure to the accused as set out in the leading authority *R.v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83.

[10] In this case, the prosecutor has determined that the documents in question should be disclosed applying the *Stinchcombe* standard that they are not clearly irrelevant and may be of assistance to the defence. However, a designated judge conducting an assessment of the information which the Attorney General seeks to protect under section 38 must make his or her own determination as to the relevance of the information to the underlying criminal case.

[11] Much of the remaining information which the Attorney General seeks to protect consists of internal administrative information such as employee names and phone numbers, file numbers and references to systems and databanks. There are scattered references to foreign agencies and the classified terms which they use. There is some information which may identify or tend to identify a continuing investigative interest in other individuals, groups or issues. Correspondence from foreign agencies contains caveats regarding further disclosure. Those letters may be wholly or partially redacted.

[12] Several of the documents concern the inquiries which the RCMP made of these foreign agencies at the direction of the Court during the earlier section 38 application to determine whether they would consent to disclosure of their information. The content of this correspondence is largely clear from the unredacted portions.

[13] There are documents in the collection pertaining to interviews of an individual conducted by the FBI and US Navy investigative personnel. The Court was advised that neither the prosecution nor the defence intends to call this individual as a witness. In any event, his statements have all been provided to the defence in unredacted form. The redacted content in relation to this individual is found in the cover letters forwarding the statements to the RCMP and the names of the interviewing officers. The letters themselves contain nothing of assistance to the defence. They are redacted as a matter of practice at the request of the originating agency under the third party rule. Some of the redacted content in them has now been released.

[14] From a close review of these documents with the assistance of the *amicus curiae* and the evidence and submissions heard *ex parte*, I am satisfied that the information which the Attorney General now seeks to protect on this application would not be of assistance to the defence in the underlying criminal proceedings and does not meet the low threshold of relevance. Had I found it necessary to proceed to the next stage of the analysis, I might have found that the Attorney General had not met his burden of establishing that disclosure of some of the redacted information would cause injury to the protected interests. As I have previously observed, there tends to be an excessive redaction of innocuous information in these cases.

[15] However, having reached the conclusion that the redacted information is not relevant, it is not necessary for the Court to deal with the second and third stages of the analysis. I will confirm the Attorney General's decision not to authorize disclosure of this information.

[16] Evidence was provided of information which was inadvertently disclosed to counsel for the respondent in several of the documents released to him by the prosecutor. This information and the seven documents in which it is found are listed in a table to an *ex parte* affidavit filed on February 15, 2007. From a review of this information I am satisfied that there was no intentional waiver of the privilege by the Attorney General and that the information is potentially injurious. It is not, in any event, relevant to the underlying criminal case. Accordingly, I will order that it be protected from further disclosure.

[17] In ruling on the prior application I considered it appropriate to issue a detailed schedule to the parties listing the documents, the nature of the information at issue, the type of claim and the decision as to disclosure. As the content of the present documents is largely clear and unredacted, and the decision rests entirely on relevance, I see no reason to repeat that practice here. As I indicated in the prior application, however, I will remain seized of this matter should either party require clarification of these reasons or the order.

[18] I wish to note the constructive approach taken by both counsel and the witnesses to this application. The witnesses were well prepared, thorough and candid in their testimony. Counsel for the Attorney General organized and presented the evidence in an efficient and capable manner. The *amicus*, Mr. Shore, conducted a diligent search for any redacted content that might prove to be relevant to the underlying proceedings. They all made the Court's task considerably easier.

**ORDER**

**THIS COURT ORDERS THAT:**

1. The application is granted and the decision of the Attorney General of Canada not to authorize disclosure of the information which was the subject of notices by counsel for the Public Prosecution Service of Canada dated December 19, 2007, February 1, 2008, February 19, 2008 and April 2, 2008, pursuant to subsection 38.01(1) of the *Canada Evidence Act*, is confirmed.
2. Information inadvertently disclosed to counsel for the respondent, as described in paragraph 16 of the Reasons for this Order, shall not be further disclosed. Counsel for the Attorney General shall provide counsel for the respondent with redacted copies of the pages in substitution for those which he now has in his possession.
3. The Court shall remain seized of this matter pending the outcome of the underlying proceedings and counsel for the parties may seek clarification of this Order at any time in writing with notice to the other party.
4. The Court Records relating to the hearing shall be kept in a location to which the public has no access pursuant to subsection 38.12 of the Act.
5. The Order of April 3, 2008 shall continue in effect respecting the payment of the reasonable fees and disbursements of the *amicus curiae*.
6. There is no award of costs.

“Richard G. Mosley”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** DES-2-08

**STYLE OF CAUSE:** Attorney General of Canada  
v.  
Mohammad Momin Khawaja

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** April 15 and 18, 2008

**REASONS FOR ORDER  
AND ORDER:** The Honourable Mr. Justice Mosley

**DATED:** April 30, 2008

**APPEARANCES:**

Mr. Derek Rasmussen For the Applicant

Mr. Leonard Shore, Q.C. Amicus Curiae

**SOLICITORS OF RECORD:**

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Deputy Attorney General of Canada

Greenspon, Brown & Associates For the Respondent  
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