Federal Court		Cour fédérale

Date: 20091130

Docket: T-1577-08

Citation: 2009 FC 1221

Ottawa, Ontario, November 30, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks access to records that the respondent withheld from him in an access to information request. The records are withheld pursuant to the solicitor-client privilege exemption set out in s. 23 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the "Act"). The applicant also alleges that the respondent kept improper records, processed his access request in bad faith and waived privilege.

[2] This access request stems from the criminal charges laid by the Crown in July 1995 against the applicant and Gateway Industries Ltd., a Winnipeg pulp and paper company of which the applicant was the director, for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Pulp and Paper Effluent Regulations*, SOR/92-269. Some of the charges were quashed in 1997, while the others were quashed in 2001. In 2002, the Crown laid new charges by way of indictment, only to stay them prior to trial in 2004. The applicant then sued the federal government for damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. This civil action is still ongoing.

[3] The applicant is a self-represented litigant. Though not properly trained in law, he is no stranger to this Court as he has launched a number of proceedings in this Court, in the Federal Court of Appeal and even in the Supreme Court of Canada, in his repeated attempts to obtain documents from the government. Although the hearing took three days and involved a massive amount of material, the issues to be resolved are nevertheless quite straightforward. The Court is not called upon to decide whether the Crown properly fulfilled its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, nor am I asked to rule on the allegations of fraud and abuse of prosecutorial powers underlying the applicant's civil action. The only issue to be determined is whether the respondent has complied with its obligations under the Act and has properly applied the section 23 solicitor-client privilege exemption to the records requested by the applicant.

a. Background

[4] The applicant, Mr. Blank, made his access request on January 21, 2002. He sought the following records from the Department of Justice ("DOJ"):

> All communications between Darrin R. Davis and anyone else, with regard to any of the topics mentioned below:
>
> i. Ministerial awareness,
> ii. Ministerial certificates,
> iii. Section 82 of the *Fisheries Act*, which includes subsections 82(1) and 82(2),
> iv. Amending any of the *Fisheries Act* charges (including P.P.E.R. charges) against Gateway Industries Ltd. /or Sheldon Blank.

[5] The applicant later agreed to limit the search for documents pertaining to his request to the Department of Justice Winnipeg Regional Office and to records held by Mr. Marty Minuk, an ad hoc agent prosecuting on behalf of the Federal Prosecution Service in the Winnipeg Regional Office, Mr. Clyde Bond, Senior Counsel with the Federal Prosecution Service in the Winnipeg Regional Office, and Mr. Darren Davis, Crown prosecutor handling the case of the applicant. The applicant alleges that he agreed to this as a starting point, but reserved the possibility to extend his request to include the Department of Fisheries, Environment Canada and the Legal Service Unit of these two departments.

[6] On February 6th, 2002, Ms. Luitwieler, counsel with the DOJ, told the applicant that there were 20 boxes of records in the prosecution file in Winnipeg to go through, which would require 200 hours of searching. Mr. Blank agreed to pay a $2 000.00 charge to process the file.

[7] On October 2, 2002, the applicant filed a complaint with the Office of the Information Commissioner of Canada (the "OICC") about the respondent's delay in responding to his request. The OICC began an investigation into his complaint.

[8] Further to the consultations with the other departments and a review of the records deemed relevant to the request, the Department of Justice Access to Information and Privacy Office ("DOJ ATIP") released ten pages, in whole or in part, to the applicant on October 30, 2002. Some information in these pages was claimed to be exempt from disclosure pursuant to s. 21(1) and s. 23 of the Act.

[9] Not satisfied with the records he received, the applicant launched a second complaint with the OICC on November 7, 2002. He alleged that the Department had failed to identify all of the documents pertinent to his request, and had exempted documents improperly. The OICC began an investigation into this complaint.

[10] On November 26, 2002, the OICC informed the applicant that the investigation into the applicant's delay complaint had been concluded. The OICC found no evidence of bad faith, although he indicated that the applicant's request could and should have been processed within the statutory time limit; he expressed concern with the department's inability to respond in a timely manner. The OICC also noted the discrepancies between the number of boxes originally thought to contain relevant records and the much smaller volume of records finally identified as relevant to the

applicant's request. That being said, he considered the applicant's complaint resolved given the release of documents by the DOJ on October 30, 2002.

[11] On December 13, 2002, the applicant wrote the OICC and asked for a better explanation in the discrepancy between the original estimate of the number of files and what was eventually released. The Commissioner replied to that letter on January 21, 2003. It is worth reproducing the portion of that letter dealing with the allegation of bad faith made by the applicant:

> You questioned how the estimate of relevant records could go from 20 boxes to one box. As you may recall, during a telephone conversation with Ms. Nancy Luitwieler on January 29, 2002, you agreed that the search for relevant records be limited to the Winnipeg regional offices and records held by Marty Minuk, Darrin Davis and/or Clyde Bond.
>
> Mr. Bond indicated that he had no records relevant to your request and Mr. Davis' records were later determined to be not relevant. Mr. Minuk responded that he had as many as 20 boxes which may contain relevant records. Prior to receiving the boxes, Justice sent you a fee estimate based on this response.
>
> During the investigation, Mr. Minuk informed my investigator that, before sending the boxes to Justice headquarters, he did a preliminary review of the material and concluded that only six boxes may be relevant to your request. The six boxes were forwarded to Justice for processing. Upon reviewing these boxes, Justice realized that records totaling approximately one box contained Darrin Davis' name and that, from the one box, only 20 pages were considered to be responsive to the request.
>
> As you can see, the fee estimate was prepared prior to Justice being aware of the actual number of records relevant to your request.

[12] In response, Mr. Blank sent a further letter to the Commissioner, essentially voicing the same concerns that he is now raising before this Court. "The concern I have", he wrote, "is that you

are relying on people to identify documents that are not only in their best interest to shield, but who might have personal liability as a result of the disclosure of the contents". He added that a proper response to his request would have involved an independent review of all the boxes originally identified, as well as a review of Mr. Bond's files, to confirm that their response was accurate. That letter was left unanswered by the Commissioner.

[13] Over the next five years, the OICC investigated the applicant's second complaint about the respondent's application of the Act exemptions and identification of the records. During the investigation, further documents were identified as possibly relevant to the applicant's request. DOJ ATIP initiated further consultations with the Winnipeg Regional Office and Environment Canada about documents that had originated at those offices. At the request of the OICC Investigator, DOJ ATIP cross-referenced several more documents. The consultations, cross-referencing and ongoing OICC investigation process culminated in a further release of 174 pages, in whole or in part, to the applicant on January 24, 2006. Again, some of the information on these pages was exempt from disclosure pursuant to s. 19(1) and s. 23 of the Act.

[14] On September 8, 2006 the Supreme Court of Canada released its decision in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319. The Court held that when litigation ends, in certain circumstances, the protection afforded by s. 23 of the Act with respect to litigation privilege also ends. As a result of that decision, the DOJ reconsidered several pages originally protected under s. 23 (litigation privilege) and made a further release from those documents to the applicant. The Department provided approximately 800 pages that were released

to the applicant after the Supreme Court decision to DOJ ATIP for consideration in this access request. DOJ ATIP subsequently cross-referenced these 800 pages with those withheld from the applicant in this request and determined that more information could be released.

[15] Consultations with the Winnipeg Regional Office again ensued. At the request of the OICC Investigator, DOJ ATIP considered several documents that the applicant had obtained through other means and had provided to the OICC. It bears mentioning that as of January 30, 2003, the applicant had made a total of 67 requests to the DOJ under the Act and the *Privacy Act* (R.S., 1985, c. P-21) and that approximately 60,000 pages were reviewed by the DOJ ATIP Office, according to the affidavit of Ms. Francine Farley, Acting Director of that Office.

[16] As a result of all this, DOJ ATIP released to the applicant additional information from the previous releases on March 17, 2008. Some of the information continued to be exempt pursuant to s. 19(1) and s. 23 of the Act.

[17] On September 5, 2008, the Information Commissioner provided the applicant with his investigation report for the second complaint. In this report, the OICC specifically agreed with the respondent's application of the s. 23 Act exemption, and found that the respondent had exercised proper discretion under s. 23 and that privilege had not been waived. Further, the OICC indicated that the complaint about locating relevant documents had been resolved given the DOJ's additional

releases and its inability to guarantee that all records created were retained. The salient part of that report reads as follows:

> **Section 23**
>
> As a result of our intervention and the evidence you have provided during the course of this investigation, the department released additional information previously exempted under section 23 of the Act. We are satisfied that the records which remain exempted qualify as solicitor-client privilege for purposes of section 23. We are also satisfied that proper discretion was exercised and that the privilege was not waived.
>
> **Missing Records**
>
> In response to the missing records portion of your complaint, it became necessary to send one of our investigators to Winnipeg on December 5, 2004, to search through some 40 boxes of records to locate additional records responsive to your request and, as a result, an additional 182 pages of relevant records were located and further releases of records were made.
> After receiving the additional release packages, you provided supplementary evidence to support your position that the section 23 exemption was applied inconsistently as some portions of certain records were exempted and the same information was released on a duplicate record. You also supplied evidence to support your contention that certain exempted information was released through other access requests and through the courts. This evidence was provided to the department, with your permission, and additional information was provided to you with the final release of information being sent to you on March 17, 2008; however, the said release record was incorrectly dated March 17, 2007. This anomaly was brought to the attention of Jus and it was verified that the correct date should have read March 17, 2008.
> After receiving the final release package, you maintained your position that not all the records responsive to your request had been processed and you provided evidence to support that there were relevant records processed on other files which were not processed on this file – records which support the existence of other records. There were also references to attachments, such as emails and fax pages, which were not attached to the appropriate records.
> Apropos the above, it should be noted that many of the records were not found in any particular order. It was also not possible to

> determine the actual relevancy of some of the attachments identified during our search through the records. This led to the processing and receipt of fewer records than there should have perhaps, been.
> In response to your allegations and the evidence you supplied to our investigator regarding missing attachments, a second trip to Winnipeg was arranged to confirm whether or not the said attachments could be found within the record holdings at Fillmore Riley. Some attachments were located and we can assure you that those attachments were processed within the 182 records processed and sent to you in the various releases by Jus.
> Our investigation has revealed that, by their own admission, Justice officials cannot guarantee that all the records created were retained. Nor were we able to determine with certainty which records were, or could, be responsive to your request.
> Based on the above, we are unable to definitely report to you that you have received all of the records to which you are entitled under the Act. We can assure you that we have done everything possible to find relevant records and review them for possible release to you. However, we will record your complaint as resolved as you have received subsequent responses from Jus during the course of this protracted investigation.
> (…)

[18] The applicant filed an application for judicial review on October 14, 2008, pursuant to section 41 of the Act.

[19] On February 9, 2009 the respondent provided the applicant with particulars for the documents withheld from him in their entirety, as ordered by the Court on January 30, 2009.

[20] At the cross-examination of the respondent's affidavit, the applicant provided more documents that he had obtained through other means. These documents were cross-referenced with those withheld in this file and some more pages were released to the applicant. As of March 23, 2009 a total of 84 pages remain exempt from disclosure in whole or in part.

[21] During the hearing, a few more documents were released by the respondent, as it was determined that they had been previously released in another request. I must confess that it was extremely difficult to determine precisely the documents that were still at issue, since the applicant kept introducing new documents that were apparently released to him in other requests and which he believes should have been disclosed to him in the context of the present request. The Court requested and received from the parties a list of the documents that are still at issue. It appears from this list, as revised on the last day of the hearing, that there are 56 pages that remain undisclosed, in whole or in part.

[22] The main issue in this application is whether the respondent has properly applied the s. 23 solicitor-client privilege exemption in the Act to the records requested by the applicant. More particularly, Mr. Blank has raised a number of questions that can be summarized in the following way:

a) Did the respondent comply with the Prothonotary's Order to provide particulars for the documents that are claimed to be exempted in their entirety or are alleged to be irrelevant?

b) Was the respondent justified in claiming solicitor-client privilege over the documents withheld?

c) Has the respondent waived its right to claim solicitor-client privilege?

d) Has the respondent failed to locate and process all of the records that were pertinent to the applicant's request, and was this deliberate?

e) Was the respondent's conduct unlawful, to such an extent that it nullifies the application of s. 23 of the *Access Act*?

II. Analysis

[23] The purpose of the Act is to provide the public with a right of access to information contained in records held by the government. This right of access, however, is not absolute. It is subject to exceptions set out in the Act. Any exceptions to this right should be limited and specific: the Act, s. 2(1).

[24] When an individual has been refused access to requested information and has made a complaint to the OICC in respect of the refusal, he or she may apply to the Court under s. 41 of the Act for judicial review of that refusal. Public access to government information ought not to be frustrated by the courts, except in the clearest of circumstances: *Reyes v. Canada (Secretary of State)*, [1984] F.C.J. No. 1135, 9 Admin. L.R. 296, at para. 3 (F.C.)

[25] On an application pursuant to s. 41 of the Act, the burden rests on the government institution to establish that the information at issue was properly exempted from disclosure: see s. 48 of the Act.

[26] When an applicant seeks judicial review of a refusal to disclose a record, the Court has the benefit of the OICC's investigation and report. The OICC's opinion is a factor to be considered on judicial review, as he has more expertise than this Court with respect to access to information:

Canada (Attorney General) v. Canada (Information Commissioner), 2004 FC 431, [2004] F.C.J. No. 524 at para. 84, rev'd on other grounds 2005 FCA 199; *Gordon v. Canada (Minister of Health)*, 2008 FC 258, at para. 20; [2008] F.C.J. No. 331, *Blank v. Canada (Minister of Justice)*, 2005 FCA 405, [2005] F.C.J. No. 2040, at para. 12. That being said, it is the refusal of the head of a government institution that the Court is charged to review, not the Commissioner's recommendations.

[27] Section 23 of the Act provides for a discretionary exemption. When reviewing the respondent's decision to withhold information from the applicant pursuant to that section of the Act, it appears that two standards of review apply as two separate decisions have to be made. This dichotomy of standards of review was originally set out in *Kelly v. Canada (Solicitor General)*, infra, where Justice Barry L. Strayer discussed the general approach to take when considering discretionary decisions to either release or refuse to release information in the context of the *Privacy Act* :

> It will be seen that 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.
>
> 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…
>
> 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.
>
> *Kelly v. Canada (Solicitor General)*, (1992) 53 F.T.R. 147, [1992] F.C.J. No. 302 at p. 3 (F.C.), aff'd (1993) 154 N.R. 319, [1993] F.C.J. No. 475 (F.C.A.).

[28] These standards of review were subsequently applied in the context of the Act by Justice John M. Evans in *3430901 Canada Inc. v. Canada (Minister of Industry) (C.A.)*, 2001 FCA 254, [2002] 1 C.F. 421 (F.C.A.). After conducting a lengthy functional and pragmatic analysis of the Act, Justice Evans concluded:

> 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. I would only note that these conclusions are identical to those of La Forest J. in Dagg, supra, without conducting a functional or pragmatic analysis.

[29] Following those decisions, this Court similarly applied a pragmatic and functional analysis and concluded that a decision as to whether a requested document falls within a statutory exemption should be reviewed on a standard of correctness, and the discretionary decision to refuse to disclose an exempted record should be reviewed on a standard of reasonableness simpliciter: *Thurlow v. Canada (Solicitor General)*, 2003 FC 1414, [2003] F.C.J. No. 1802, at paras. 28-29. See also *Elomari v. Canadian Space Agency*, 2006 FC 863, [2006] F.C.J. No. 1100 at para. 21.

[30] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court held that there are only two standards of review: correctness and reasonableness. Questions that attract correctness scrutiny warrant no deference on judicial review. To the contrary, discretionary decisions generally attract review on the reasonableness standard.

[31] Therefore, this Court must apply two different standards of review with regard to the respondent's decision to refuse to release information pursuant to the solicitor-client privilege exemption in s. 23 of the Act. It must apply the correctness standard to review the decision that the withheld information falls within the s. 23 statutory exemption, and the standard of reasonableness to the discretionary decision to refuse to release exempted information. Of course, the Court must also consider whether the discretion was exercised in good faith and for a reason rationally connected to the purpose for which it was granted.

A. *Compliance With the Prothonotary's Order to Provide Particulars*

[32] In his Order of January 30, 2009, Prothonotary Roger Lafrenière ordered the respondent to provide the applicant with a list of the following particulars of the documents that are claimed to be exempted in their entirety or are alleged to be irrelevant: 1) the page number(s) designation on the document; (2) the date of the document; (3) the addressee and addressor of the document; (4) the title of the document; and (5) the specific reason why exemption is being claimed. These particulars were provided by the respondent on February 9, 2009.

[33] Any issues arising from this Order should have been dealt with by way of a motion before the application hearing. Be that as it may, I believe the respondent fully complied with the Order. It is true, as noted by the applicant, that no dates, addressee or addressor are provided for any of the documents. Having had the advantage of seeing the unredacted documents, however, I can confirm that all of these documents are drafts that were attached to a communication between Darrin Davis and his client, as described in the "reason for exemption" column of the Respondent's Document Particulars. As such, they were not dated, and there was no addressee or addressor on the documents per se. I am therefore of the view that the respondent has complied with the Order of Prothonotary Lafrenière.

B. *Was the Respondent Justified in Claiming Solicitor-Client Privilege Over the Documents Withheld?*

[34] Section 23 of the Act provides a discretionary exemption from disclosure for records that contain information subject to solicitor-client privilege:

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.	Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

[35] The importance and sanctity of solicitor-client privilege have been affirmed many times by this Court and the Supreme Court of Canada. In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, Justice John C. Major, writing for a unanimous Court, stated (at para. 17) that solicitor-client privilege ought to be "jealously guarded" and that it should only "be

set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction". The Court also reiterated the importance of solicitor-client privilege within the government context, writing that it arises when "in-house government lawyers provide legal advice to their client, a government agency" (at paras. 19).

[36] More recently, the Supreme Court held that solicitor-client privilege in s. 23 of the Act includes both legal advice privilege and litigation privilege: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] S.C.J. No. 39. Legal advice privilege is concerned with confidential communications between lawyers and their clients. The rationale underlying this privilege is the recognition that counsel and client must have the ability to exchange information and advice in a full and frank manner without fear that such exchanges will be released to entities outside the privileged relationship (*Blank*, supra, at para. 26). For that reason, it is vital that this privilege be absolute and indefinite in duration (*Blank*, supra, at paras. 8, 37). The criteria to establish solicitor-client privilege have been outlined in the following way by Justice Robert George Brian Dickson (as he then was) in *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 837: 1) a communication between solicitor and client; 2) that entails the seeking or giving of legal advice; and 3) that is intended to be confidential by the parties.

[37] On the other hand, litigation privilege relates to information and materials gathered or created in the litigation context. Its purpose is to create a "zone of privacy" in the preparation and the conduct of pending or apprehended litigation; its duration, therefore, is temporary as it expires with the litigation of which it was born, absent closely related proceedings (*Blank*, supra, at paras. 6,

8 and 34). The test to determine whether such a privilege should attach to a document is that: 1) it is a communication; 2) prepared or obtained; 3) for the "dominant purpose" of reasonably anticipated litigation (*Blank*, supra, at paras. 59-60).

[38] It is worth noting that the applicant's civil action for damages against the Crown for fraud, conspiracy, perjury and abuse of prosecutorial powers was held by the Supreme Court in *Blank*, supra, not to be a "closely related proceeding" to the underlying criminal prosecution. As a result, previously "litigation privileged" materials had to be disclosed. The respondent reconsidered approximately 800 pages at issue in the Supreme Court case. After considering and cross-referencing these pages with the ones in this file, more information was released to the applicant on March 17, 2007.

[39] The Supreme Court also held in *Blank*, supra, that there is often a potential for overlap of legal advice privilege and litigation privilege in the litigation context. Legal advice privilege may continue to apply to material to which litigation privilege no longer attaches (*Blank*, at para. 49). I have found that there are several examples of this kind of overlap in the case at bar. This is true, in particular, of draft court documents or submissions. These draft documents remain protected by legal advice privilege under s. 23 of the Act even though the final version of these documents may have been released once the litigation privilege that applied to them had come to an end. Draft court documents, while being drafted, represent an interchange between solicitor and client, wherein the solicitor provides the client with direction or options as to the legal position to be taken in pending litigation. The client, in turn, comments on that legal advice, provides further instructions, and so

forth. Draft court documents and submissions are, by their very nature, intended to be confidential. It is only the final version that is filed with, or submitted to, the court that is not so intended. The draft court documents or submissions clearly satisfy the three criteria set out in *Solosky*, supra, for legal advice privilege.

[40] I have also carefully examined the other documents that have been withheld by the respondent, and I have found that they are all protected by the legal advice privilege under s. 23 of the Act. They all meet the three criteria for legal advice privilege, as they all pertain to the giving or seeking of legal advice that was intended to be confidential by both parties.

[41] Indeed, the Information Commissioner agreed with the respondent that the records exempted qualify as solicitor-client privilege for the purposes of s. 23 of the Act. While this finding is not determinative, it obviously carries much weight in light of the expertise possessed by the Commissioner.

[42] Once it is determined that records are exempt pursuant to s. 23 of the Act, the head of a government institution is required to determine whether any part of the record can be reasonably severed pursuant to s. 25 of the Act. This section reads as follows:

Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or	Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant

other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.	tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[43] The Federal Court of Appeal has held that severance means that general "identifying information" should be severed and released, except where to do so would reveal privileged information: *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265, at 271. The "identifying information" to be severed includes "the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block". Severed information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more": *Black v. Canada (Minister of Justice)*, 2004 FCA 287, [2004] F.C.J. No. 1455 (F.C.A.), at para. 66, aff'd in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] S.C.J. No. 39.

[44] The respondent has properly severed the records at issue by providing the appropriate identifying information for the information withheld. Moreover, the respondent provided further identifying information for the documents undisclosed in their entirety, pursuant to the order of Prothonotary Lafrenière. Accordingly, the respondent has provided the applicant with all the information to which he is entitled, without revealing any privileged information.

[45] This is not the end of the matter, however. As already mentioned, the DOJ must demonstrate not only that the documents withheld come within the purview of the exemption found in section 23 of the Act, but it must also show that it acted in good faith in exercising its discretion and deciding that the documents would not be released. But before turning to this issue, I shall first deal with the argument raised by the applicant that the privilege was waived.

C. *Has the Respondent Waived Its Right to Claim Solicitor-Client Privilege?*

[46] The applicant appears to argue that the respondent waived its right to claim solicitor-client privilege over the information withheld in this file, on the basis of representations that Mr. Minuk, appearing for the Crown, has made at the criminal proceedings before the trial judge in the Manitoba Queen's Bench. Having carefully reviewed the transcripts of those hearings filed by the applicant, I am unable to find any evidence that would support a claim for waiver. The representations made by Mr. Minuk had to do with the ministerial awareness of, and the limitation period for, the criminal charges that were laid against him and his company under the *Fisheries Act*, R.S.C. 1985, c. F-14. These representations can in no way be assimilated to an explicit or even an implicit waiver of the documents withheld by the respondent.

[47] The applicant also contended that once a document has been obtained in the context of another Access request, the privilege that may attach to it must be taken to have been waived for all intent and purposes. That cannot be so. A document sometimes takes its colour from the context in which it is found; the particular wording of an Access request must also be taken into consideration. As a consequence, it is at least conceivable that a specific document may be found to be releasable

in one Access request and not releasable in another, without there being any improper use of the discretion conferred by section 23 of the Act. In any event, many of the documents that the applicant claims to have received pursuant to other Access requests have been released by the respondent during the hearing.

[48] For the same reasons, I am also of the view that the respondent did not have the obligation to cross-reference all the documents released as a result of other Access requests filed by the applicant with the documents considered in the Access request underlying the case at bar. First of all, the respondent would only be able to cross-reference documents that are under its control, as each government institution is a separate entity for the purpose of the Act. In any event, the sheer number of Access requests made by the applicant, and the corresponding number of documents that have been released as a result, would have entailed for the respondent a massive expenditure of time and energy that could only have added costs and delays for the processing of this Access request. And may be more importantly, each Access request must be treated as a discrete and self-contained exercise, to be performed with due consideration of the language used in the request and its focus.

D. *Has the Respondent Failed to Locate and Process All of the Records That Were Pertinent to His Request, and Was This Deliberate?*

[49] The applicant alleges that the respondent deliberately failed to locate and process all of the records that were pertinent or relevant to his request. He further argues that this was deliberate. Yet, he has provided no factual basis to support these allegations, beyond the discrepancy between the

twenty boxes that were originally considered to be relevant and the 10 pages that were ultimately released on October 30, 2002.

[50] Despite the applicant's assertions, the facts prove otherwise. The respondent, in fact, went to great lengths to locate and process all of the documents relevant to the request, albeit not as expeditiously as it should have done. Several consultations with the Winnipeg Regional Office and other departments were held to determine what could be released. The DOJ ATIP Office also cross-referenced numerous pages released in other requests or as the result of other court proceedings, and cooperated with the Information Commissioner investigators. As a result, three further releases of documents were made to the applicant between 2002 and 2008, thereby providing him with another 800 pages or so. While not all documents were collected and released at first, subsequent searches and releases ensured that the applicant was provided with most of the information to which he is entitled. It may well be that some documents created by the respondent were not retained or located, as admitted by the respondent itself. But I am satisfied that everything that could realistically be done to comply with the applicant's Access request has been done. Indeed, the OICC itself reported that they have done "everything possible to find relevant records and review them for possible release" to the applicant, therefore recording his complaint as resolved. Once again, the considered opinion of the Commissioner is a factor to be considered on judicial review by this Court.

[51] The applicant asks this Court to order the respondent to conduct a new search for records relevant to his request. Even assuming that the Court has jurisdiction to do so under section 49 of the Act, which gives it the authority to "make such other order as the Court deems appropriate", the

Court will be reluctant to do so. As noted by Justice Strayer in *X v. Canada (Minister of National Defence)*, (1992) 58 F.T.R. 93, [1992] F.C.J. No. 1006, a condition precedent to exercising such a power is a determination that "the head of a government institution refuses to disclose a record requested under this Act…" (at p. 3). In the case at bar, it appears that every reasonable effort has been made to locate the relevant records, and even the investigators mandated to look into the applicant's complaint have been unable to find any wrongdoing by the respondent. Therefore, there is no basis for making the order requested by the applicant.

E. *Was the Respondent's Conduct Unlawful?*

[52] It is clear that at the second stage of the process, the Court will not review the decision made by the government institution with a view to determine if it would have come to the same conclusion, but will 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. As already mentioned, the standard of review at this second step of the inquiry is that of reasonableness. In considering whether appropriate disclosure was made, the Court will consider only the Act and the jurisprudence guiding its interpretation and application, as opposed to the laws requiring disclosure in other type of legal proceedings, most notably in the criminal law context: *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, [2004] F.C.J. No. 1455, at para. 14.

[53] The applicant takes the view, as he did in previous proceedings before this Court, that the respondent not only did not disclose all the records to which he was entitled, but that the decision to withhold a number of documents was taken in bad faith, by those very individuals that stand to lose

most in his underlying and ongoing civil action for damages against the Crown for fraud, conspiracy, perjury and abuse of its prosecutorial powers. He alleges, more particularly, that Mr. Minuk, Mr. Davis and Mr. Bond have a vested interest in ensuring that their conduct will not be revealed, since they were all involved in what the applicant considers dishonest and even criminal behaviour. Both in his oral and written arguments, the applicant recites at length his view of the events surrounding the criminal proceedings that have already been concluded. He is adamant that if some documents had been disclosed to him, he could have been successful in his motion to stay the proceedings against him and his company in 1999. He also alleges that Mr. Davis, one of the three named individuals in his Access request, acted in bad faith and could not be impartial and fair in his processing of that request since his attendance to a conference in 1995 was paid for (at least in part) by Environment Canada. Finally, he contends that the material that should have been disclosed to him in his criminal trial pursuant to the Stinchcombe principles (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326) should now be disclosed under the Act.

[54] It is not the first time the applicant has raised these arguments before this Court. He made the same allegations most recently in *Blank v. Canada (Minister of the Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635. Here is how my colleague Justice James J. Russell dealt with these innuendos (at para. 33):

> I do not have clear evidence before me concerning what the Applicant did or did not receive as part of the Prosecution process, or why disclosure in those proceedings was not handled as part of those proceedings. The Applicant says he was kept in the dark about what was happening during the Prosecution. However, I believe the Federal Court of Appeal has made it clear that I should consider "only the Act and the jurisprudence guiding its interpretation and application." (…). Likewise, as regards Mr. Murray's conduct in

> disclosing the contents of his own file, I have no evidence before me to suggest that he is dishonestly withholding information in order to shield his own past misconduct.
>
> See also: *Blank v. Canada (Minister of Justice)*, 2004 FCA 287, at paras. 63-64; *R. v. Gateway Industries Ltd.*, 2002 MBQB 285, at para. 32.

[55] Despite having been given the opportunity to do so, the applicant has provided no concrete evidence to support his allegations. He merely speculates as to the content of the withheld information. Yet this Court will only act on evidence, and not on mere suspicion: *Blank v. The Minister of Environment*, (2000) 100 A.C.W.S. (3d) 377, [2000] F.C.J. No. 1620. While I do not wish to express any view as to the merit of the applicant's civil action in damages against the Crown, I will only venture to add that the fact the respondent may have taken different views, over time, as to the necessity to produce a ministerial certificate to establish that the charges against the applicant were laid within the prescribed time limitation, is not sufficient, in and of itself, to prove bad faith or even criminal conduct by counsel having carriage of the prosecution.

[56] There remains the issue of costs. The applicant asks for a nominal award of costs, and for a "very significant penalty for having violated the Applicant's statutory right of access and to act as a deterrent to similar conduct in the future by the Department of Justice".

[57] I see no basis for an award of costs to the applicant. In the normal course of events, costs follow the outcome. This principle has been explicitly confirmed by Parliament in paragraph 53(1) of the Act. The only exception to that general rule is found at paragraph 53(2), according to which costs shall be awarded to the applicant even if he has not been successful in the result where the

Court is of the opinion that an application has raised an important new principle in relation to the Act. In the present case, the application raises no important new principle in relation to the Act, and the applicant has not even tried to substantiate such a claim.

[58] There is no basis for an award of punitive costs either. While the respondent may not have always shown promptness in dealing with the applicant's Access request, it does not amount to an inappropriate behaviour that would justify awarding punitive costs to the applicant. The OICC confirms this assessment in its reports. As a result, an award of costs designed to sanction the respondent's conduct would be unfounded.

[59] Accordingly, I see no reason to diverge from the usual practice to award costs in favour of the respondent.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed, with costs in favour of the respondent.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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