Federal Court  Cour fédérale

Date: 20110228

Docket: T-2184-09

Citation: 2011 FC 233

Ottawa, Ontario, February 28, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JOYCE SCHERTZER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Joyce Schertzer is a sergeant with the Toronto Police Service. In 2003, she was intensely interrogated by the United States Border Service on her way out of Pearson International Airport to a United States destination, and was similarly interrogated by the Canadian Border Service Agency (CBSA) on her return. This led her, not immediately but in 2006, to request the CBSA for access to her record in accordance with the *Access to Information Act*. Although she suspected that the CBSA had prejudicial information, which had to be incorrect, she did not have to justify herself.

[2] She was given some information, but part of the file was withheld or only provided in redacted form. The CBSA took the position it was exempted from providing the information withheld in virtue of sections 16(1)(*a*), 16(1)(*b*) and 24(1) of the Act. She complained to the Information Commissioner. The reply was that the Commissioner was of the opinion that section 16(1)(*a*) applied and, furthermore, that a small portion of the information was properly withheld under section 24(1). It was not found necessary to determine whether a refusal to disclose could also have been justified under section 16(1)(*b*) of the Act.

[3] This is an application by Ms. Schertzer for a review of the matter in accordance with section 41 of the Act. It is important to note that what is under review is not the opinion of the Information Commissioner, but rather the decision of the CBSA to withhold information.

[4] Subsections 16(1)(*a*) and (*b*) provide:

16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains	16. (1) Le responsable d'une institution fédérale peut refuser la communication de documents :
(*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	*a*) datés de moins de vingt ans lors de la demande et contenant des renseignements obtenus ou préparés par une institution fédérale, ou par une subdivision d'une institution, qui constitue un organisme d'enquête déterminé par règlement, au cours d'enquêtes licites ayant trait :
(i) the detection,	(i) à la détection, la

prevention or suppression of crime,	prévention et la répression du crime,
(ii) the enforcement of any law of Canada or a province, or	(ii) aux activités destinées à faire respecter les lois fédérales ou provinciales,
(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,	(iii) aux activités soupçonnées de constituer des menaces envers la sécurité du Canada au sens de la *Loi sur le Service canadien du renseignement de sécurité*;
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;	*b*) contenant des renseignements relatifs à des techniques d'enquêtes ou à des projets d'enquêtes licites déterminées;

[5] Section 24(1) goes on to say:

The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[6] That section brought into play section 107(2) of the *Customs Act* which prohibits persons from knowingly providing anyone with any customs information.

[7] A decision by an institution head to refuse to disclose the records is reviewable on the standard of correctness, while the exercise of discretion under the Act is reviewable on the reasonableness standard (*Canadian Imperial Bank of Commerce v Canada (Canadian Human Rights Commission)*, 2007 FCA 272, [2008] 2 FCR 509 at para 8).

[8] Although it is obvious from the decision that customs information is involved, Ms. Schertzer does not know if an investigation is being carried out by Customs and Excise itself, by one or more of the seven other investigative bodies identified in Schedule I to the *Access to Information Regulations*, or in conjunction with bodies that are not investigative bodies within the meaning of the Act, such as provincial organizations. In this case, I can say that the investigation or investigations are all by Schedule I bodies.

[9] The information withheld from Ms. Schertzer is before me in virtue of a confidentiality order issued by Prothonotary Milczynski. I am satisfied that sections 16(1)(*a*), 16(1)(*b*) and 24 of the Act are applicable, not necessarily that all three subsections apply to each and every document withheld or redacted, but the documents cannot really be segregated one from the other. To the extent the CBSA had discretion, it was exercised reasonably.

[10] To reveal any of the information (which information might well be absolutely incorrect) would prejudice a past, ongoing or future investigation, and would reveal investigative techniques, as well as customs information. The record was less than 20 years old at the time of the request.

[11] Counsel points out that section 16(1) speaks of “lawful investigation.” On cross-examination, the affiant allowed that he was not personally involved in the investigation. The question arose then as to how could he possibly know whether the investigation was lawful or not. Inquiries had to be carried out.

[12] In my opinion, such an approach would be intolerable given the thousands upon thousands of access to information requests. Furthermore, if the investigation is of a matter which falls within the jurisdiction of the investigative body or bodies in question, as in this case, the head of the government institution faced with the request to disclose information need look no further. This view happens to be consistent with Treasury Board Guidelines, which, of course, are not binding upon this Court. The Guidelines state that “the term ‘lawful’ means that the investigation itself must not be contrary to law.”

[13] At the close of the hearing, I informed counsel that I intended to dismiss the application, and so invited them to address costs. Counsel for Ms. Schertzer suggested that section 53(2) of the Act is applicable. Section 53(1) has the usual proviso that costs are at the discretion of the Court, and shall follow the event unless otherwise ordered. However, section 53(2) provides:

Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	Dans les cas où elle estime que l’objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[14] It was submitted that earlier jurisprudence focused on “investigations” rather than “lawful investigations” and that the argument raised an important new principle. I do not agree. I took a common sense approach to “lawful” as did the Treasury Board. No important new principle in relation to the Act was raised.

[15] Counsel for the Minister submitted a draft bill of costs in the amount of $3,607.25, based on Column III, the low to middle side. She also pointed out that some disbursements were not included such as the cost of bringing the affiant from Ottawa to Toronto for cross-examination.

[16] I see no reason why costs should not follow the event. In my discretion, I round them down to $3,500, all inclusive.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed with costs in favour of the respondent in the amount of $3,500, all inclusive.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2184-09
STYLE OF CAUSE:	JOYCE SCHERTZER v MPSEP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 17, 2011
REASONS FOR ORDER AND ORDER BY:	HARRINGTON J.
DATED:	FEBRUARY 28, 2011

APPEARANCES:

Kevin Toyne	FOR THE APPLICANT
Sandra Nishikawa	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brauti Thorning Zibarras LLP Barristers & Solicitors) Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT