

Federal Court



Cour fédérale

**Date: 20110418**

**Docket: T-1080-10**

**Citation: 2011 FC 471**

**Ottawa, Ontario, April 18, 2011**

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

**BETWEEN:**

**BRIAN PATRICK DOYLE**

**Applicant**

**and**

**HUMAN RESOURCES AND SKILLS  
DEVELOPMENT CANADA**

**Respondent**

**TRANSCRIPT OF REASONS**

Let the attached version of the transcript of my Reasons for Judgment delivered orally from the bench at Charlottetown, Prince Edward Island, on April 6, 2011, be filed to comply with section 51 of the *Federal Courts Act, RS, 1985, c F-7*.

“ R. L. Barnes ”

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Judge

***IN THE FEDERAL COURT OF CANADA***

***BETWEEN:                      BRIAN PATRICK DOYLE***  
  
***APPLICANT,***  
  
***-and-***  
  
***HUMAN RESOURCES AND SKILLS***  
***DEVELOPMENT CANADA***  
  
***RESPONDENT.***

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***BEFORE:                      The Honourable Mr. Justice Barnes***  
***PLACE:                        Charlottetown, Prince Edward Island***  
***DATE:                         April 6, 2011***  
***APPEARANCES:            Brian Patrick Doyle, on his own behalf***  
***Corinne Bedford, on behalf of the Respondent***

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***--- TRANSCRIPT ---***

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***Court Registrar: H el ene Laforge***  
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**TABLE OF CONTENTS**

<b><u>WITNESS</u></b>	<b><u>PAGE</u></b>
-Oral reasons	3-14

**ITEMS MARKED AS EXHIBITS**

No items were marked during this judicial review.

\*\*\*Please note that words in quotation marks A @ are words that either are not part of the English language or are words that are not agreed properly.

\*\*\*Also note that a word followed by (sic) notes an obvious error by the speaker.

**ORAL REASONS RENDERED BY Mr. JUSTICE BARNES:**

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Please be seated. Thank you for your patience.

Mr. Doyle, let me begin by noting how respectable a job you did presenting your case today. You did a much better job than the vast majority of self-represented litigants that come before this Court, and actually, I want to compliment both of you for the efficiency with which you presented your cases this morning, and for the tone of the presentations.

I always appreciate it when despite the fact that you are in an adversarial setting, the tone of the submissions is gracious and polite. So, thank you for that.

So these are my reasons:

This is an application by Brian Doyle under section 41 of the *Privacy Act*. That provision provides for the following relief on an application to the Federal Court:

1 "Any individual who has been refused  
2 access to personal information  
3 requested under subsection 12(1) may,  
4 if a complaint has been made to the  
5 Privacy Commissioner in respect of the  
6 refusal, apply to the Court for a  
7 review of the matter within 45 days  
8 after the time the results of an  
9 investigation of the complaint by the  
10 Privacy Commissioner are reported to  
11 the complainant under subsection 35(2)  
12 or within such further time as the  
13 Court may, either before or after the  
14 expiration of those 45 days, fix or  
15 allow." -- As read

16  
17 Mr. Doyle has concerns about four  
18 types  
19 of documents that the Respondent has either not produced  
20 or has belatedly produced.

21  
22 The first concerns page 2 of his  
23 resume, which was not initially produced by the Respondent  
24 but was located later and sent to him.

25

1                   He thinks it odd that the version of  
2 this page presented to him is different than the other  
3 pages which were produced which contained unique fax  
4 transmission information and he speculates that interview  
5 notes may have been removed from the page that he did  
6 receive on the later occasion.

7

8                   The second concern involves interview  
9 notes that he would have expected in his file that were  
10 not, in this case, produced beyond the notes found on the  
11 face of the reference forms.

12

13                   Thirdly, he expresses concern about  
14 the Respondent's failure to transfer the reference check  
15 scores to the master scoring sheet, which he speculates  
16 may have been caused by another undisclosed reference  
17 check.

18

19                   Fourth, he is concerned about a  
20 reference list that he says he left at the interview.  
21 This document was never produced by the Respondent,  
22 although he acknowledges that one of the references he  
23 listed was contacted.

24

25                   The Privacy Commissioner found that

1 Mr. Doyle's complaint was well-founded with respect to  
2 page 2 of his resume, but that the Respondent's  
3 explanations for the other documents were adequate in the  
4 circumstances and the complaint therefore stood resolved.

5  
6 Mr. Doyle has also expressed concerns  
7 about the diligence of the Privacy Commissioner's  
8 investigation into his complaint.

9  
10 The Privacy Commissioner is not a  
11 party to this proceeding, and I am not able to make any  
12 order concerning the manner about which the Commissioner  
13 conducted her investigation into Mr. Doyle's complaint.

14  
15 Even if the Commissioner was a party  
16 to this proceeding, there is no basis for any order to  
17 issue concerning one of her investigations carried out in  
18 good faith.

19  
20 She fulfils the role of an Ombudsman  
21 and does not make decisions that are open to being  
22 judicially reviewed in this Court.

23  
24 My authority is limited under section  
25 41 of the *Privacy Act* to an examination of documents that

1 the Respondent is refusing to produce or perhaps hiding  
2 from disclosure.

3 I have evidence under oath that  
4 diligent searches were conducted for the material that Mr.  
5 Doyle says he had produced or should have been in the  
6 Respondent's file, according to his expectations at least.

7  
8 While I accept that Mr. Doyle's list  
9 of references has probably gone missing, that page 2 of  
10 his resume had gone missing for a time and that some  
11 interview notes may have gone missing, I can see nothing  
12 to support an inference that this situation represents  
13 some type of misfeasance or a constructive withholding of  
14 material by the Respondent.

15  
16 There would be no obvious motive for  
17 anyone in the Department to get rid of information that  
18 Mr. Doyle had produced, and as Mr. Doyle acknowledges, a  
19 finding of some ulterior motive would only be speculation.

20  
21 I unreservedly accept the affidavit of  
22 Ms. Villeneuve and the truthfulness of its contents. It  
23 is inconceivable to me that anyone in her position would  
24 swear a false affidavit in a matter such as this.

25



1                   What we are left with at most is a  
2 situation where some documents from an employment  
3 competition interview may have gone missing, and despite  
4 the efforts of the Respondent to locate them, they have  
5 not resurfaced.

6  
7                   On the other side, we have Mr. Doyle  
8 expressing a suspicion or as he put it, "it's very odd".  
9 What is really odd is the idea that what happened may have  
10 had some ulterior purpose behind it.

11  
12                   Mr. Doyle did quite well in the  
13 competition. If someone was out to derail his career in  
14 the federal public service, it is a strange way to go  
15 about it.

16  
17                   In my eye, this case is  
18 indistinguishable from the decision of this Court in *Blank*  
19 *vs. Canada* [2000] CanLii II, 16437, where Justice Muldoon  
20 was dealing with an equivalent provision in the *Access to*  
21 *Information Act*.

22  
23                   At paragraphs 9 to 11 in that  
24 decision, he held as follows:

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"Section 41 of the Act states:

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 that refusal, apply to the Court for a review of the matter ...

This indicates, as does the wording of sections 49 and 50, that judicial review is available only where there is an actual or constructive refusal of access continuing at the time of the hearing in Court. Without a refusal, the Court lacks the jurisdiction to grant a remedy, since the only one available is that of an order to disclose.

Constructive or "deemed" refusals were discussed in *X. v. Canada (Minister of National Defence)*. Mr. Justice Strayer stated that a refusal of

1 access is a condition precedent to an  
2 application under those sections and  
3 the only matter to be remedied by the  
4 Court where it finds for the applicant  
5 ... the only remedy the Court can  
6 give is to order disclosure and such  
7 an order is not available if  
8 disclosure has already taken place.

9  
10 In assessing the validity of the  
11 claim, Strayer, J. went on to state:

12  
13 Unless there is a genuine and  
14 continuing refusal to disclose, and  
15 thus an occasion for making an order  
16 for disclosure or its equivalent, no  
17 remedy can be granted by this Court  
18 ... It is not the role of the Court to  
19 immerse itself in the reasonability of  
20 the conduct of the internal affairs of  
21 a government department in matters of  
22 access to information, except where a  
23 genuine and continuing refusal or  
24 deemed refusal of access can be  
25 demonstrated.

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In concluding, the Court found the application to be "frivolous and vexatious because its futility should have been amply evident to the applicant".

In further consideration of the refusal issue, the jurisprudence asserts that where an applicant claims that documents are being withheld, there must exist some evidence of the fact beyond mere suspicion. In *Creighton v. Canada (Superintendent of Financial Institutions)*, this Court stated with regard to acting on suspicion:

There may be a suspicion in his mind - and it may be a reasonable suspicion - that there could be more material in the hands of the Respondent, but ... the Court simply cannot operate on suspicion. Suspicion is something which is communicated to a good

1                   investigator who turns up evidence.  
2                   The Court will act on evidence but not  
3                   on suspicion." -- As read  
4                   So in conclusion, there is nothing in  
5 the evidence before me to establish that the Respondent is  
6 deliberately withholding material from Mr. Doyle or that  
7 the searches it has conducted to date represent some  
8 breach of a legal duty under the Act.

9

10                   Documents sometimes go missing, and  
11 apparently they did in this situation, but I have no  
12 authority under section 41 to make an order in these  
13 circumstances.

14

15                   The application is therefore  
16 dismissed.

17

18                   The Respondent is entitled to an award  
19 of costs because as previously mentioned, ordinarily costs  
20 follow the event.

21

22                   Mr. Doyle argues that he was forced  
23 into the Federal Court by the Respondent stonewalling him.  
24 I don't accept that. We all have choices, and this case  
25 is no different.

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The Court is not here to judge the good faith recording-keeping practices of the Respondent. That is not my role under section 41, and to the extent that this application involved complaints of that type or concerns about the role of the Privacy Commissioner, it was ill-conceived.

The Respondent is entitled to a reasonable award of costs to offset in part the burden that would otherwise fall on the taxpayers of Canada from this litigation.

I have looked at the decision in the *Blank* case that counsel for the Respondent has provided me. The award given in *Blank* is higher than would be appropriate here.

Justice Muldoon, in the original decision, awarded what he said were moderate costs, which in the later assessment decision given to me were taken to mean costs under column 3. I'm not sure that is what was intended by Justice Muldoon, but the assessment officer went on to say in that case that it involved complex factual issues, and it's apparent that it went on for a

1 considerable period of time.

2

3 This in comparison is a relatively  
4 simple case, albeit with some out-of-pocket expenses that  
5 perhaps are a little more than the norm.

6

7 I'm going to award costs and  
8 disbursements in this case to the Respondent in the amount  
9 of \$1,500.

10

11 Those are my reasons. Thank you very  
12 much for your submissions today, and that brings this  
13 proceeding to a conclusion, unless there are further  
14 questions from either one of you.

15

16 **MS. BEDFORD:** No, My Lord. Thank you  
17 very much.

18

19 **MR. DOYLE:** No, Your Honour. Thank  
20 you for your time.

21

22 **REGISTRAR:** This special sitting of  
23 the Federal Court in Charlottetown is now closed.

24

25 **HEARING ADJOURNED AT 12:40 P.M.**





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

**DOCKET:** T-1080-10

**STYLE OF CAUSE:** DOYLE v HUMAN RESOURCES AND SKILLS  
DEVELOPMENT CANADA

**PLACE OF HEARING:** Charlottetown, PEI

**DATE OF HEARING:** April 6, 2011

**TRANSCRIPT OF REASONS:** BARNES J.

**DATED:** April 18, 2011

**APPEARANCES:**

Brian Patrick Doyle

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Corrine Bedford

FOR THE RESPONDENT

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