Federal Court  Cour fédérale

Date: 20140113

Docket: T-1375-12

Citation: 2014 FC 32

Ottawa, Ontario, January 13, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOHN MICHAEL JOSEPH FREZZA

Applicant

and

MINISTER OF NATIONAL DEFENCE
CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 41 of the *Privacy Act*, RSC, 1985, c P-21 [Act] for judicial review of two decisions of a delegate of the Minister of National Defence [Minister], dated 23 December 2010 and 5 January 2011, refusing access to certain personal information requested by the Applicant under subsection 12(1) of the Act.

BACKGROUND

[2] The Applicant was a civilian employee of the Department of National Defence [DND or the Department] whose employment was terminated under section 62 of the *Public Service Employment Act*, SC 2003, c 22, ss. 12, 13 near the end of his one-year probationary period. The Applicant worked in the Joint Personnel Support Unit / Integrated Personnel Support Centre [JPSU] in Toronto. Before becoming a civilian employee of DND, the Applicant performed an apparently similar job in Ottawa as a uniformed member of the Canadian Armed Forces, within the Directorate of Casualty Support Management [DCSM]. His performance reviews while "in uniform" in Ottawa were quite positive, but concerns arose with respect to his performance in Toronto, leading to the termination. The Applicant grieved his termination, as well as a management Memorandum of Expectations that preceded his dismissal, which he viewed as a form of disguised discipline. In pursuing these grievances, the Applicant filed several requests for access to information held by DND, including the two requests at issue in this proceeding.

[3] The requests at issue here were both filed under subsection 12(1) of the Act on December 1, 2010. They sought all documents relating to the Applicant's dismissal that were held by two DND human resources [HR] professionals – a Labour Relations Officer [LRO] at the Department's headquarters in Ottawa-Hull (Isabelle Tremblay), and a regional labour relations subject matter expert [SME] based in Toronto (Jackie Lean).

[4] The Applicant's first request (P-2010-03965, or the Ottawa LRO request) was for:

> All correspondence – notes, emails, Memo's concerning "Rejection on Probation" of John Frezza AS4, JPSU S/Ontario held by Ms. Isabelle Tremblay (HR-CIV) DLRO Ottawa-Hull.

[5] This request was re-scoped on December 16, 2010 with the Applicant's consent, in view of the fact that Ms. Tremblay was no longer working for DND when the request was received. The revised request was for:

> All correspondence – notes, emails, Memo's concerning "Rejection on Probation" of John Frezza AS4, JPSU S/Ontario previously held by former employee Ms. Isabelle Tremblay (HR-CIV) DLRO Ottawa-Hull.

[6] The Applicant's second request (P-2010-03966, or the Toronto SME request), was for:

> All correspondence – notes, emails, Memo's concerning "Rejection on Probation of John Frezza AS4, JPSU S/Ontario held by Ms. Jackie Lean, Subject Matter Expert Labour Relations DCHRCS-Toronto

[7] With respect to the Toronto SME request, DND identified 29 pages of relevant documents, but initially declined to release all of these documents to the Applicant based on subsection 22(1)*(b)* of the Act, which provides an exemption from disclosure where it would be injurious either to the enforcement of a federal or provincial law or to the conduct of a lawful investigation. The Respondent's evidence indicates that the latter was the justification here: the information was deemed to be related to a "labour investigation" in relation to the Applicant's ongoing grievance. The Department sent the Applicant a letter on 23 December 2010 stating:

> Please be advised that the documentation you requested is part of an ongoing grievance and as such has been exempted in its entirety under paragraph 22(1)*(b)* law enforcement and investigation of the *Privacy Act*. You may re-submit a new request once this administrative/grievance is completed.

[8] With respect to the Ottawa-Hull LRO request, DND responded by letter on 5 January 2011, advising the Applicant that "[f]ollowing a thorough and complete search for all records in response

to your request, it is determined that no records could be located that were held by former employee Ms. Isabelle Tremblay." DND e-mails submitted by the Respondent indicate that Ms. Tremblay's e-mail account was erased upon her departure, and that a search of her former office and filing cabinets did not reveal any relevant documents.

[9] Dissatisfied with these responses, the Applicant complained to the Office of the Privacy Commissioner [OPC] on 5 January 2011 and 15 February 2011. In essence, these complaints alleged that DND had contravened the Act by refusing access to personal information related to the Applicant's termination. The OPC assigned an investigator to look into the complaints.

[10] On 21 October 2011, following discussions with the OPC, DND released to the Applicant the 29 pages identified as relevant to the Toronto SME request [disclosure package], with some redactions. The redactions occur in a document titled "Third Level Grievance Report," prepared by Human Resources Officer (Ontario Region) Lynn Greenwald and addressed to BGen Madower, Assistant CMP, NDHQ [National Defence Headquarters] as well as in a cover note prepared by SME Jackie Lean with respect to this report. While the record is not absolutely clear on this point, it seems that Brigadier General Madower was to hear the grievance at the third stage or level. The department claimed these redactions were justified under subsection 22(1)*(b)* of the Act, and also under section 26 of the Act, which was not cited when the documents were initially withheld. Section 26 provides an exemption from disclosure where the personal information requested relates to someone other than the requesting party.

[11] The Applicant alleges in this proceeding that the redactions contravene the Act by unlawfully withholding personal information from him. The un-redacted documents have been provided to the Court through a confidential affidavit filed by the Respondent, which is subject to a sealing order issued by Prothonotary Milczynski on 19 October 2012. A motion by the Applicant to unseal these documents was dismissed by Prothonotary Aalto on 17 September 2013.

[12] The OPC issued its Report of Findings on 1 June 2012 and sent it to both the Applicant and the Respondent.

[13] With respect to the Toronto SME request, the OPC report noted (erroneously it would appear) that the DND responded to the Applicant on 23 December 2010 by providing access to some information and withholding other information. The report stated that DND had re-examined its original position and provided additional information to the Applicant as a result of the investigation, but that some information continued to be withheld under subsection 22(1)*(b)* and section 26 of the Act.

[14] With respect to the redactions justified by reference to subsection 22(1)*(b)*, the OPC noted that this was a discretionary exemption that allows a government institution to "refuse to disclose personal information if the release of that information could reasonably be expected to be injurious to the enforcement of any law of Canada or the conduct of lawful investigations." The report stated that "[i]t has been established to our satisfaction that DND properly invoked this provision." No further explanation was provided on this point.

[15] With respect to the single redaction justified with reference to section 26, the report stated that "Our review of the information at issue confirmed that the exempted information was not the complainant's information, and, therefore, the exemption was properly applied."

[16] In the "Findings" section, the OPC stated with respect to the Toronto SME request:

> As the complainant did not initially receive access to all of the information to which he was entitled, the complaint is **well-founded**. However, now that additional information has been provided to the complainant, the matter is considered **resolved**.
>
> [Emphasis in original]

[17] The Applicant requested clarification regarding the report's finding that subsection 22(1)*(b)* was properly invoked, and specifically "the detailed references with regard to the notation of 'any law of Canada and/or lawful investigations,' as outlined in the findings." The OPC responded on 22 June 2012 in a letter stating:

> For purposes of clarity, we note that the Office arrived at this conclusion in light of the fact that there was an ongoing grievance procedure under the *Public Service Relations Act* at the time of the complainant's *Privacy Act* request to National Defence.

[18] Documents submitted to the Court by the Applicant in conjunction with a motion for leave to amend his Application, submitted 11 September 2013 and refused by Prothonotary Aalto on 25 September 2013, show that the information that was redacted on the basis of subsection 22(1)*(b)* of the Act was released to the Applicant on 13 November 2012. This was after the Applicant's Record in this matter was filed. In addition, correspondence from the Applicant to the Court of 16 September 2013, regarding the Applicant's motion to unseal the confidential affidavit, states that the Applicant is now "knowledgeable of" the words redacted on the basis of section 26. The

Respondent says this makes the application moot, as the Court is only empowered under section 41 of the Act to require the release of the information withheld, and the information at issue has now all been released. The Applicant says there are still important legal principles at stake and seeks other relief.

[19] With respect to the Ottawa LRO request, the OPC characterized the complaint as being one about missing information. The report notes that the LRO from whom documents were sought had left DND's employ prior to the request being received, and that nothing was retained after she left. The OPC stated that the LRO's role in such matters is to provide expert advice, guidance and interpretations to the regional SME – an involvement that was "only advisory and somewhat remote." As such, the LRO may maintain a working file of correspondence for some cases, but does not necessarily do so for each case. Only when the grievance reaches the final level would the LRO have a file in their possession, and the grievance in this case was only at the first level. All correspondence and information would officially be held by the regional labour relations team, not the LRO, and "[t]his is why the LRO in this case did not have any documents relevant to the case." The report notes, however, that those whom the LRO advised did retain "many emails that were sent to them," and that the Applicant received information written by the LRO through other *Privacy Act* requests. The report states that "[t]he evidence is clear that a complete search was performed" and "[t]he evidence also demonstrates that the LRO simply did not have a file about the complainant because her role in this file was seen as advisory only." The report goes on to observe, however:

> Notwithstanding the fact that the LRO's role may have been rather small, the *Privacy Act* is clear that information used as part of an administrative decision making process should be kept for a minimum of two years. We note that we cannot conclude that the

> information was used for an administrative purpose because the information had been destroyed and it could not be reviewed.

[20] In the "Findings" section, the report states with respect to the Ottawa LRO request:

> Given that we cannot see the content of these emails, we conclude that the requested information did not exist at the time of the request. This complaint is then deemed **not well-founded**.
>
> [Emphasis in original]

[21] In a section titled "Other," the report goes on to state that the fact that information generated by the LRO was retained in files held by those she was advising "did not obfuscate the need for the LRO to ensure that any information about the complainant that was used for administrative purposes was kept." The report notes that the OPC asked DND to amend its record-keeping practices to ensure retention of this type of information in the future, and DND agreed to examine its procedures, and in the meantime to retain emails and electronic records of departing staff for six months. The report stated that this was not long enough and requested DND to extend it to two years. It also requested that DND report back within 30 days to confirm if it had implemented this recommendation, and if not, to provide an explanation.

DECISION UNDER REVIEW

[22] The decisions under review are those of the Minister's delegate, the Director, Access to Information at DND, in response to the Applicant's access requests: see *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 [*Leahy*] at para 84. As described above, in one case the Director refused access to certain personal information about the Applicant, and in the other the Director reported that no such information could be found responsive to the request. While the

Applicant's complaints to the OPC were a precondition to filing the current application, and the OPC's report may inform the Court's deliberations, that report is not the decision under review. The named respondent in this application is and ought to be the Minister.

[23] Section 41 of the Act states that a party who has been refused access to personal information "may… apply to the Court for a review of the matter."

RELIEF SOUGHT

[24] As originally filed, the application sought the following forms of relief:

1. An order pursuant to section 49 of the Act that the Respondent disclose the requested records to the Applicant, as required by subsection 12(1) of the Act;
2. An order that the Respondent retain all records pertaining to the [Memorandum of Expectations] received by the Applicant on March 25, 2010 and subsequent termination of employment on May 31, 2010, until such time as all Court Proceedings have concluded, notwithstanding the recommendation of the Privacy Commissioner of Canada and section 7 of the *Privacy Regulations*, SOR/83-508;
3. The costs involved in this application;
4. An order imposing a seven day deadline for full disclosure and a penalty of $500.00 per day thereafter until full disclosure occurs;
5. Such other relief as the Applicant may advise and this Honourable Court may consider just and equitable in the circumstances.

ISSUES

[25] The following issues arise in this matter:

a. Is the application moot?

b. Did the Minister's delegate act unlawfully or unreasonably in:

i. refusing access to personal information relating to the Applicant on the basis of subsection 22(1)*(b)* and section 26 of the Act?

ii. reporting that no information responsive to the Ottawa LRO request could be found, or failing to ensure the retention of information that would be responsive to that request? and

c. If the answer to part i. or ii. of issue b. above is yes, what remedies if any is the Court empowered to grant on this application?

[26] The Respondent has also asked the Court to strike this motion on the grounds that, because the Applicant is now in possession of all of the information he sought, there is no longer any issue to be litigated.

STANDARD OF REVIEW

[27] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake

a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[28] In *Savard v Canada Post Corporation*, 2008 FC 671, Justice Blanchard conducted a standard of review analysis in light of *Dunsmuir*, above. He found at para 17 that the Court's review under section 41 of the Act is a two stage process. The first stage, looking at whether the information at issue is "personal information" or falls within a legal exception to disclosure, involves review on a standard of correctness (see also *Thurlow v Canada (Solicitor General)*, 2003 FC 1414 at para 28). The second stage, involving the review of a discretionary decision to withhold information from disclosure, is to be conducted on a standard of reasonableness. This precedent was followed by Justice Kelen in *Canadian Assn. of Elizabeth Fry Societies v Canada (Minister of Public Safety Canada)*, 2010 FC 470 at paras 45-46, and endorsed by the Federal Court of Appeal in *Leahy*, above, at paras 98-99, and I propose to follow it here as well. Thus, the question of whether the information at issue fell within the legal exceptions to disclosure set out in subsection 22(1)*(b)* and section 26 of the Act is reviewable on a standard of correctness, while the discretionary decision of the Minister's delegate to invoke these exemptions in refusing to disclose the information is reviewable on a standard of reasonableness.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put

another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[30] The following provisions of the Act are applicable in these proceedings:

Definitions	**Définitions**
3. In this Act,	3. Les définitions qui suivent s'appliquent à la présente loi.
"administrative purpose", in relation to the use of personal information about an individual, means the use of that information in a decision making process that directly affects that individual;	« fins administratives » Destination de l'usage de renseignements personnels concernant un individu dans le cadre d'une décision le touchant directement.
[…]	[…]
"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
[…]	[…]
(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,	*e)* ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

[…]	[…]
(g) the views or opinions of another individual about the individual,	*g)* les idées ou opinions d'autrui sur lui;
[…]	[…]
but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include	toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :
(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,	*j)* un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
[…]	[…]
(v) the personal opinions or views of the individual given in the course of employment,	(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;
[…]	[…]
Retention of personal information used for an administrative purpose	**Conservation des renseignements personnels utilisés à des fins administratives**
6. (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may	6. (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés après usage par l'institution pendant une

be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

[…]

Right of access

12. (1) Subject to this Act, every individual who is a Canadian citizen or 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

(a) any personal information about the individual contained in a personal information bank; and

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

[…]

Findings and recommendations of Privacy Commissioner

35. (1) If, on investigating a complaint under this Act in

période, déterminée par règlement, suffisamment longue pour permettre à l'individu qu'ils concernent d'exercer son droit d'accès à ces renseignements.

[…]

Droit d'accès

12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande :

a) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.

[…]

Conclusions et recommandations du Commissaire à la protection de la vie privée

35. (1) Dans les cas où il conclut au bien-fondé d'une

respect of personal information, the Privacy Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the personal information with a report containing

plainte portant sur des renseignements personnels, le Commissaire à la protection de la vie privée adresse au responsable de l'institution fédérale de qui relèvent les renseignements personnels un rapport où :

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;

(b) where appropriate, a request that, within a time specified therein, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

(2) The Privacy Commissioner shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where a notice has been requested under paragraph (1)*(b)* no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

(2) Le Commissaire à la protection de la vie privée rend compte au plaignant des conclusions de son enquête; toutefois, dans les cas prévus à l'alinéa (1)*b)*, le Commissaire à la protection de la vie privée ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

[…]

[…]

Review by Federal Court where access refused

Révision par la Cour fédérale dans les cas de refus de communication

41. Any individual who has

41. L'individu qui s'est vu

been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy 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 Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[…]

[…]

Burden of proof

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

Charge de la preuve

47. Dans les procédures découlant des recours prévus aux articles 41, 42 ou 43, la charge d'établir le bien-fondé du refus de communication de renseignements personnels ou le bien-fondé du versement de certains dossiers dans un fichier inconsultable classé comme tel en vertu de l'article 18 incombe à l'institution fédérale concernée.

Order of Court where no authorization to refuse disclosure found

48. Where the head of a government institution refuses to disclose personal information requested under subsection

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

48. La Cour, dans les cas où elle conclut au bon droit de l'individu qui a exercé un recours en révision d'une

12(1) on the basis of a provision of this Act not referred to in section 49, the Court shall, if it determines that the head of the institution is not authorized under this Act to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

décision de refus de communication de renseignements personnels fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 49, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court where reasonable grounds of injury not found

49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)*(b)* or *(c)* or 24*(a)*, the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

49. Dans les cas où le refus de communication des renseignements personnels s'appuyait sur les articles 20 ou 21 ou sur les alinéas 22(1)*b)* ou *c)* ou 24*a)*, la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

[31] The following provisions of the *Privacy Regulations*, SOR/83-508 are applicable in these proceedings:

4. (1) Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution	4. (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés par cette institution :
(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and	*a)* pendant au moins deux ans après la dernière fois où ces renseignements ont été utilisés à des fins administratives, à moins que l'individu qu'ils concernent ne consente à leur retrait du fichier; et
(b) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act.	*b)* dans les cas où une demande d'accès à ces renseignements a été reçue, jusqu'à ce que son auteur ait eu la possibilité d'exercer tous ses droits en vertu de la Loi.
[…]	[…]

ARGUMENT

Applicant

Substantive Merits of the Application

[32] The Applicant argues that the purpose of access to information and privacy legislation must be considered in applying the provisions of the Act: *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403. As such, the exemptions from disclosure provided for in the Act must be narrowly

construed. He cites *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 [*Lavigne*] on this point:

> 24 The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2)…
>
> […]
>
> 30 Given that one of the objectives of the *Privacy Act* is to provide individuals with access to personal information about themselves, the courts have generally interpreted the exceptions to the right of access narrowly...

[33] In the case of the exception to disclosure set out in subsection 22(1)*(b)* of the Act, non-disclosure can only be justified where the government organization holding the information can show a clear and direct link between the disclosure sought and the injury that is alleged. Again, the Applicant cites *Lavigne*, above:

> 58 The non-disclosure of personal information provided in s. 22(1)*(b)* is authorized only where disclosure "could reasonably be expected" to be injurious to investigations... There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process...

[34] The Applicant argues that promises of confidentiality to interviewees, speculative harm, or the possible "chilling effect" disclosure might have on future investigations are not valid grounds for refusing disclosure: *Canada (Information Commissioner) v Canada (Minister of Citizenship and*

Immigration), 2002 FCA 270 [*Information Commissioner v MCI*]. He cites Justice Richard's observation in *Canada (Information Commissioner) v Canada (Chairperson, Immigration and Refugee Board)*, order of 24 December 1997 in matter T-908-97:

> [45] Where the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard is not met. It must have an impact on a particular investigation, where it has been undertaken or is about to be undertaken. One cannot refuse to disclose information under paragraph 16(1)*(c)* of the *Access to Information Act* or paragraph 22(1)*(b)* of the *Privacy Act* on the basis that to disclose would have a chilling effect on possible future investigations.

[35] With respect to the Respondent's argument that opinions expressed by others within DND should be protected from disclosure under section 26 as the personal information of the speaker, the Applicant points to the Court of Appeal's finding in *Information Commissioner v MCI* that "the personal opinions of an individual (or interviewee) are his 'personal opinion' except when they are about another individual [the Applicant] in which case paragraph 3(g) provides that they become the 'personal information' of [the Applicant]," and that the identity of the speaker is protected under paragraph 3(h) only when the opinions concern a proposal for a grant, award or prize: *Information Commissioner v MCI*, above, at paras 23-24. The Court of Appeal in that case weighed the private interest of the opinion-holder in not having their opinions disclosed against the private interest of the requester in accessing personal information about himself, and concluded as follows:

> [30] The private interest of the interviewees is in hiding the fact that they participated in the inquiry and keeping confidential conversations they had with an investigator…
>
> [31] This private interest is minimal. The fact that the interviewees participated in the inquiry has, in itself, little significance and, to the extent that they can justify the views they expressed, they should not fear the consequences of the disclosure, although, obviously, there may be some. To the extent that they

> cannot justify their views, they might have reason to fear. The fear, however, is caused not by the disclosure but by the fact that the views were expressed in the first place and that, perhaps, they were not justifiable.
>
> […]
>
> [33] The private interest of [the Applicant], on the other hand, is significant… Surely, he must be given the opportunity to know what was said, and by whom, against him, if only to exercise his right under subsection 12(2) of the Privacy Act to clear his name in the Department's archives.
>
> [34] The public interest in the disclosure is to ensure fairness in the conduct of administrative inquiries. Whatever the rules of procedural propriety applicable in a given case, fairness will generally require that witnesses not be given a blank cheque and that persons against whom unfavourable views are expressed be given the opportunity to be informed of such views, to challenge their accuracy and to correct them if need be.

[36] The Applicant argues that no explanation for withholding information under subsection 22(1)(b) was provided, but only a conclusion, and that this is contrary to the Court's guidance in *Kaiser v Canada (Minister of National Revenue)* (1995), 95 DTC 5416, [1995] FCJ No 926 (FCTD). There, Justice Rothstein noted that the Act places the onus on the government to justify non-disclosure, and held that a Minister or their delegate must provide explanations that "clearly demonstrate a linkage between disclosure and the harm alleged so as to justify confidentiality." Justice Rothstein continued (at para 3):

> [A]n explanation such as 'disclosure of this information would prejudice the integrity of the investigation and therefore be injurious to the enforcement of the *Income Tax Act*' is insufficient. That is not an explanation but only a conclusion. Indeed, there may be reasons why disclosure would prejudice the integrity of an investigation, but an explanation has to be given as to why that is so. No such explanation has been given. The Minister has not satisfied the onus upon him of demonstrating that the confidentiality which he seeks is necessary because disclosure could reasonably be expected to be

> injurious to the enforcement of the *Income Tax Act* or of any investigation under the *Income Tax Act* or for any other reason referred to in paragraph 22(1)*(b)* of the *Privacy Act*.

[37] The Applicant further argues that the Respondent cannot alter its position as to the reasons for non-disclosure after the notice of the decision not to disclose is given: *Ternette v Canada (Solicitor General)*, [1992] 2 FC 75 (TD); *Davidson v Canada (Solicitor General)*, [1987] 3 FC 15 (TD), aff'd [1989] 2 FC 341 (CA).

[38] The Applicant also argues that his rights to a fair process are implicated in this matter. This argument appears to relate both to the impact of the non-disclosure on the grievance process and to the manner in which the OPC's investigation and report were completed. The Applicant says that his right to a fair hearing in accordance with the principles of fundamental justice, as set out in subsection 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 (see *Duke v The Queen*, [1972] SCR 917) was infringed. The rules of natural justice and procedural fairness provide that an individual subject to an administrative process is entitled to know the case against him (*R v H*, [1986] 2 FC 71 at para 12 (FCTD); *Gough v Canada (National Parole Board)*, [1991] 2 FC 117 (FCTD); *Gray v Ontario (Director, Disability Support Program)* (2002), 212 DLR (4th) 353 at 364 (Ont CA)), and to have an opportunity to respond by presenting their case fully and fairly: *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. These concerns are heightened when the ability to continue in one's employment or profession is at stake: *Megens v Ontario Racing Commission* (2003), 64 OR (3rd) 142 (Div Ct); *Kane v University of British Columbia*, [1980] 1 SCR 1105. The Applicant says the non-disclosures at issue here prevented him from fully understanding and responding to the case against him in the grievance process.

[39] In addition, the Applicant argues that his procedural fairness rights have been frustrated by the Respondent's failure to properly retain the personal information to which he sought access through the Ottawa LRO request, as required by section 6 of the Act.

[40] The Applicant argues that the OPC failed in its responsibility to uphold these rights through its investigation and report, and asks this Court to overturn the findings of that report that his complaints were, respectively, "well-founded and resolved" and "not well-founded".

Respondent

Mootness of the Application

[41] The Respondent has brought a motion to strike this application on the basis that it is now moot, given that all of the information at issue is now in the hands of the Applicant. The Respondent argues that the application was brought under section 41 of the Act, that this is the only grant of jurisdiction to the Court under the Act, and that anything the Court might order under that provision has now already been done. A refusal of access is a precondition to an application under section 41 (*Wheaton v Canada Post Corp*, [2000] FCJ No 1127 (FCTD) at para 16), and the case law is clear that once the information has been provided, there is no other remedy that the Court can provide: *Connolly v Canada Post Corp* (2000), 197 FTR 161, [2000] FCJ No 1883 (FCTD) [*Connolly*] at paras 8, 12 (per Justice MacKay), aff'd 2002 FCA 50; *Galipeau v Canada (Attorney General)*, 2003 FCA 223 [*Galipeau*] at para 4; *Lavigne v Canada (Canadian Human Rights Commission)*, 2011 FC 290 at para 14 [*Lavigne 2011*]. Since the Court can only order disclosure,

and disclosure has already been made, the application is moot: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 15 [*Borowski*].

Substantive Merits of the Application

[42] The Respondent says that the sole issue to be addressed is whether the Respondent properly and fully responded to the Applicant's two requests for access to personal information, and that the Minister's responses were indeed proper.

[43] With respect to the Ottawa LRO request, the Respondent argues that the OPC concurred with the Respondent's conclusion that no responsive documents could be located, and the Applicant has failed to adduce any evidence to suggest that the OPC erred in this finding.

[44] With respect to the Toronto SME request, the Respondent argues that the exemptions in subsection 22(1)*(b)* and section 26 were both properly invoked. Under s. 49, the Court may order that information withheld under subsection 22(1)*(b)* be disclosed only if the refusal was not rooted in reasonable grounds. Furthermore, the word "investigation" in subsection 22(1)*(b)* is to be read broadly: *Lavigne*, above, at para 54; see also *Maydak v Canada (Solicitor General)*, 2005 FCA 186 at paras 12-15.

[45] The Respondent argues that the requirement of injury to an investigation, which is central to subsection 22(1)*(b)*, is met if the information to be protected is somehow confidential: *Lavigne*, above, at para 58. The fact that the information redacted here was considered to be confidential by the investigators writing the Third Level Grievance Report and the cover note is evidenced by the

provisional and open nature of their comments. Requiring that this information be shared with the Applicant would thus prove injurious to the investigation, and withholding it was reasonable since the investigation was ongoing. The release of the information may well have affected the efficacy and continued viability of the investigation.

[46] The Respondent says the redactions at pages 6 and 14 of the disclosure package (which contain identical passages) relate to internal background analysis concerning the Applicant's Third Level Grievance that was not meant – at least in this form – for sharing. Disseminating it beyond the limited intended audience would curtail the opportunity for internal analysis of the grievance in advance of issuing a formal response, and could therefore lead investigators to be less frank in their assessment of the case. Likewise, disclosing the material redacted at pages 8 and 29 of the package would force the Respondent to reveal strategy and related information that was intended for internal consumption only. This might significantly restrict the Respondent's ability to plan and execute its grievance response.

[47] The Respondent argues that ordering disclosure could also prompt the Applicant to challenge one or more of the facts stated, or to request additional documents or particulars, all of which could complicate, slow or threaten the ongoing investigation.

[48] The Respondent says that disclosing the redacted information could also result in further difficulties including but not limited to:

a. Impacting upon the possibility of settlement;

b. Impacting upon the possibility of referral to adjudication;

c. Impacting the types and effectiveness of other recourse mechanisms available to the parties;

d. Placing the Applicant at an advantage with respect to this or other attempts to address the issues raised in the grievance; and

e. Creating false expectations on the part of the Applicant insofar as such preliminary analysis and recommendations may not in the end be adopted by the decision maker.

[49] With respect to the information redacted under section 26 of the Act (at pp. 4 and 12 of the disclosure package), this material concerns personal views expressed by third parties, and was therefore exempt from disclosure under section 26.

[50] The Applicant was in no way denied procedural fairness at any step of his efforts to obtain information under the Act. Rather, the Respondent was careful to apprise him of all relevant issues and to respect his rights. All available materials responsive to the requests were provided to the Applicant, all redactions were justified in law, and at no time was information withheld in the absence of a legitimate explanation, as confirmed by the OPC. Every effort was made to conform with both the letter and spirit of the Act in responding to the two requests.

ANALYSIS

[51] By the time this application came on for review before me on September 30, 2013, events had overtaken the original grounds for bringing the application. In effect, Mr. Frezza has received the information he was originally seeking under his section 41 application, and he readily conceded that his application was moot.

[52] Mr. Frezza's continuing concern is that his requests for information should never have been refused in the first place, and he wants the Court to review the delay and resistance involved in releasing the information with a view to assisting other Canadians who seek information under the Act. He concedes mootness but he requests that the Court nevertheless go on to examine the issues involved and provide declaratory relief by using the principles established in *Borowski*, above.

[53] While the Court understands Mr. Frezza's frustrations and his continuing concerns about how requests for information are handled under the Act, there are several reasons why the Court cannot grant him the modified relief that he now seeks.

[54] First of all, this new issue and request for declaratory relief was not a part of Mr. Frezza's original application. The specific relief requested there only made reference to the disclosure he sought under the Act. Mr. Frezza attempted to amend his application by a motion that came before Prothonotary Aalto and was denied.

[55] Hence, the only application before me is the original one that does not raise mootness and does not request that the Court go on to consider the general implications of Mr. Frezza's experiences and grant declaratory relief.

[56] Secondly, I think the jurisprudence is clear that the Court has a narrow jurisdiction when it comes to section 41 applications and the relief it can provide. As the Respondent points out, there is a long line of cases in this Court and the Federal Court of Appeal which have interpreted section 41 of the Act and its effect. The underlying principle of these cases is that once the information has

been provided, then there is no other remedy for the Court to provide. Apart from the disclosure of documents which Mr. Frezza has now received, Mr. Frezza is seeking relief that this Court does not have the jurisdiction to grant.

[57] In *Connolly*, above, the Justice MacKay considered the implications of section 41 under the Act. He noted as follows:

> 8 That section must be read together which ss. 48 and 49 which set out the authority of the Court to act where it finds that access to requested personal information has been wrongfully refused. Those provisions limit the Court's authority to ordering that there be access where that has been refused contrary to the Act.
>
> …
>
> 12 In sum, since the applicant has received the information he requested to which he was entitled, and that circumstance existed at the time of his application for review under the *Privacy Act*, despite the advice of the Privacy Commissioner of Canada, I find **the Court has no remedy to provide to the applicant in regard to delay by the respondents** in finally according him access to personal information under the Act.
>
> [Emphasis added]

Justice MacKay's decision was upheld on appeal. Similarly, the Federal Court of Appeal in *Galipeau*, above, held as follows:

> 5 In any event, the power to intervene that is given to the Court in section 48 of the Act is in sequence with the remedy provided in section 41. **It is limited to ordering disclosure of information that has been requested.**
>
> [Emphasis added]

[58] More recently, in *Lavigne 2011*, above, the Court states at paras 13 to 14 that declarations and damages cannot be awarded under section 41:

> 14 In his application, Mr Lavigne seeks a declaration that Connelly should not be followed and that damages can be awarded pursuant to s. 41 of the *Privacy Act*. I do not think that it is open for this Court to make such a declaration. Not only has the decision reached in Connelly been upheld by the Court of Appeal, but it has repeatedly been followed by this Court: see, for example, *Keita v Canada (Minister of Citizenship and Immigration)*, 2004 FC 626, at para 12; *Murdoch v Royal Canadian Mounted Police*, 2005 FC 420. In this last decision, Mr. Justice Noël commented:
>
> > 22. Nor is the Federal Court able to award any further remedies in a case such as the one at bar. As noted above, the Federal Court's jurisdiction to review decisions of the Privacy Commissioner is found in s. 41 of the *Privacy Act* for those cases where access to personal information requested under s. 12 has been refused and s. 18.1(3) of the *Federal Courts Act*. **In addition to this, the power of the Federal Court to grant a remedy in such a situation is largely restricted to those which the Privacy Commissioner itself could order, i.e., the ordered disclosure of non-disclosed documents (see ss. 48-50 of the *Privacy Act* and s. 18.1(4) of the *Federal Courts Act*). Here, no such information has remained undisclosed, and so this remedy would not be appropriate.**
> >
> > [Emphasis added]

[59] The result of these cases is that if disclosure has been made, then the Applicant is without a remedy under section 41 of the Act. This Court has no power to provide any remedy with respect to the relief that the Applicant, Mr. Frezza, is now seeking.

[60] Thirdly, I do not think this is the kind of case that, given the agreement between the parties that the application is moot, warrants further consideration and relief from the Court. The Applicant's experiences in seeking information under the Act are specific to him.

[61] The Supreme Court of Canada set out the approach to be followed in determining whether the Court should decide a matter despite the fact that it has become moot in *Borowski*, above. The general practice is that the Court will not decide such a case, but the Court has discretion to depart from the usual practice and decide a moot issue if the circumstances warrant: *Borowski*, above, at paras 15-16 and 30. While this is a discretionary decision, it is to be made with due regard for established principles: *Borowski*, above, at para 29. The Court is guided by the three main factors set out in *Borowski* (though the Supreme Court made it clear that this is not an exhaustive list):

a. The continued existence of an adversarial context;
b. Concern for judicial economy; and
c. Concern for the proper role of the judiciary not to intrude on the law in making function of the legislative branch.

[62] The analysis of these factors is contextual in nature. All three factors need not be present, but each needs to be considered (*Borowski* at para 42).

[63] In this case, I do not have any concerns about the third factor, which the Supreme Court related to the broader concept of "justiciability" as well as the need to be sensitive to whether the Court is departing from its traditional role and whether judicial intervention would be effective in the circumstances: see *Borowski*, above, at paras 40-41 and 47. I have no doubt that, in a proper case, the legal questions that arise in this matter are proper questions for the Court to decide.

[64] Rather, my concerns relate to the first and second factors. The first relates to the important role of the adversarial model in ensuring the Court has a full and complete record upon which to

decide the legal questions at issue, and to set the factual context and parameters for those legal determinations. While the parties, as in *Borowski*, above, argued their positions vigorously as though a live controversy still existed, I do have concerns about gaps and weaknesses in the record before me. As such, I am not convinced that this is a proper case for the Court to answer legal questions that it does not need to answer to settle a live controversy between the parties. The Federal Court of Appeal in *Leahy*, above, faced with a record on a section 41 application that did not provide a sufficient basis for determining whether exemptions from disclosure had been properly claimed, found that it could only refer the matter back to be decided by a different decision maker within the institution that refused disclosure, despite the fact that the usual remedy in a section 41 case is an order for disclosure: see *Leahy*, above, at paras 100 and 146. Such a finding would obviously serve no purpose here, where the information has already been disclosed.

[65] A related concern is judicial economy, which weighs against deciding a moot issue except "if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it": *Borowski*, above, at para 34. The Supreme Court gave some examples of when this might be the case, such as:

- Where "the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action": *Borowski*, above, at para 35;
- Where the issues that have become moot are of a recurring and brief duration, such that declining to answer them on the basis of mootness might prevent their being determined at all by the courts: *Borowski*, above, at para 36; and

- Where there is an issue of public importance that needs to be resolved, and a social cost associated with leaving the matter undecided: *Borowski*, above, at paras 38-39.

[66] I do not think any of these justifications is present in this case. It has not been demonstrated that deciding the legal issues that arise here will have any practical or "collateral" consequences for the rights of the parties. With respect to the second example, the Supreme Court observed that the mere fact of possible recurrence is not sufficient, and "[i]t is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved": *Borowski*, above, at para 36. It seems quite likely that there will be cases where the refusal to release information based on the exceptions cited by the Respondent here will persist up to the point of the judicial review hearing, thus providing an opportunity to determine the relevant legal questions in the context of a live controversy. While there may be a public interest in having these legal questions adjudicated, and some social cost in delaying clarification on some points, I find that this is outweighed by the benefits of having the legal questions decided in the context of a live controversy and by my concerns regarding the strength and completeness of the record before me. In addition, as noted above, the Applicant's experiences and circumstances are specific to him, and any legal findings I might make here would be limited to those circumstances. I therefore decline to exercise my jurisdiction to decide the matter despite its mootness.

[67] In conjunction with this application, and given that the Applicant has received the information he was seeking, the Respondent has moved that the application be struck on the basis that it is plain and obvious that it cannot succeed. Given the Applicant's concession on mootness

and my conclusions against considering further relief, I think that the Respondent has established a case for striking in accordance with the criteria set out in *David Bull Laboratories (Canada) Inc. v Pharmacid Inc.*, [1995] 1 FC 588. However, the practical result is the same whether the application is dismissed for mootness or struck because it is plain and obvious that it cannot succeed.

[68] The parties agree that the only other outstanding matter between them is the issue of costs and they have both made written submissions on costs.

[69] The Respondent points out that the Applicant has continued with this application even after he received the information in question and it was obvious that the relief he sought was no longer available. He was offered the opportunity to discontinue on a no-cost basis three times, which he refused.

[70] The Applicant says that he continued because, notwithstanding the fact he had received the information he sought, he felt he was providing a service to Canadians by attempting to have the Court review general practices of resistance and insufficient reasons on the part of the department refusing to disclose and the Office of the Privacy Commissioner.

[71] My review of the record reveals that, as a self-represented litigant, the Applicant was, perhaps, somewhat naïve in assuming that, given the nature of a section 41 application, the Court could engage in a more general assessment of the practices of the Office of the Privacy Commissioner with a view to alleviating some of the frustrations he has experienced. So I see nothing malicious or vexatious in the Applicant wanting to place this issue before the Court, even

though it is the Respondent who has been ultimately successful. I do not think that people in the position of the Applicant should be discouraged from raising genuine complaints and bringing them before the Court by imposing substantial cost awards against them.

[72] At the same time, I do not think that the Applicant should have his costs because the Respondent did explain the mootness issue to him and he was offered the opportunity to withdraw on a cost-free basis. There has to be some encouragement to self-represented applicants to examine the issues and the jurisprudence carefully before they put the Respondent to the trouble of defending what has in this has case become a fairly obvious case of mootness.

[73] The Respondent is claiming costs in the amount of $5,476.61. For reasons given above, I think an amount fixed at $1,500.00 would be appropriate in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the Respondent fixed at $1,500.00.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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