

Federal Court



Cour fédérale

Date: 20160310

Docket: T-517-15

Citation: 2016 FC 307

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

HENDRIK TEPPER

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Attorney General of Canada (AGC) seeks to protect certain documents from disclosure to Mr Hendrik Tepper, a plaintiff in an action against the Crown, on grounds of public interest immunity. In his action, the plaintiff alleges that he was denied adequate assistance while he was detained in Lebanon pursuant to an Interpol warrant.

[2] The AGC raises public interest immunity in respect of portions of all or part of 424 documents in its possession, relying on s 37 of the *Canada Evidence Act*, RSC 1985, c C-5. There are three main grounds on which the AGC invokes s 37: The information sought to be protected relates to (1) information about other persons who sought consular assistance from Canada, not relevant to Mr Tepper's claim; (2) information relating to foreign or bilateral relations, unconnected to Mr Tepper's circumstances; and (3) information obtained through international policing activities.

[3] The AGC submits that disclosure of the information in issue would, respectively, compromise the integrity of its consular activities and violate the privacy expectations of other Canadian citizens; undermine Canadian diplomatic activities; and jeopardize cooperation with international policing organizations.

[4] Mr Tepper submits that 150 of the 424 documents in issue have already been disclosed to him and, therefore, that the AGC cannot now object to their disclosure on public interest grounds. Further, he maintains that the public interest in disclosure of the contested documents outweighs any public interest immunity.

[5] In the face of a s 37 application, the Court must decide if it can be granted on the face of the supporting affidavits or if the documents in issue must be examined before deciding the application. In this case, based on the parties' written and oral submissions, I decided that the plaintiff's concerns had sufficient merit to justify reviewing the documents themselves to determine whether the grounds for the claimed immunity were justified. In arriving at that

conclusion, I considered the nature of the public interests put forward by the AGC, the degree of connection between the documentary evidence and the pleadings, the serious nature of the plaintiff's allegations, and the other evidence available to the plaintiff (having regard to the factors set out in *Khan v Canada* (TD), [1996] 2 FC 316, at para 26).

[6] After careful review of each of the 424 documents in issue and the AGC's proposed redactions, I have concluded that the public interest immunity claimed by the AGC is justified. Accordingly, I will grant the AGC's application.

[7] Two issues arise on this application:

1. Can the AGC assert public interest immunity in respect of documents already produced?
2. Should the public interest immunity be granted?

II. Issue One – Can the AGC assert public interest immunity in respect of documents already produced?

[8] Mr Tepper argues that the AGC has already turned over 150 documents in an unredacted form and cannot now claim public interest immunity in respect of their contents.

[9] The AGC points out that these documents were never "disclosed" to Mr Tepper. Rather, the AGC granted Mr Tepper's counsel permission to review them in an effort to demonstrate that the documents were irrelevant to this action. The AGC claims that claims of immunity or privilege in respect of them were never relinquished.

[10] In the circumstances, I agree with the AGC.

[11] At various points when the parties were before me to address issues relating to the production of documents, counsel for the AGC repeatedly advised that issues of privilege or immunity remained to be determined. Even as it made documents available to the plaintiff for purposes of resolving issues relating to relevancy, at no point did the AGC abandon the right to make claims for public interest immunity or other grounds of non-disclosure. In fact, the AGC repeatedly reminded the Court that these issues remained to be determined.

[12] Accordingly, in the circumstances, I cannot agree with the plaintiff that the AGC has waived public interest immunity in respect of the documents in issue.

III. Issue Two – Should public interest immunity be granted?

[13] Mr Tepper argues that the public interest favours disclosure of the contents of the documents in issue. The information that the AGC proposes to redact, he says, are relevant to his claim against the Crown and, therefore, the interest in disclosing it supersedes the Crown's interest in shielding it.

[14] I disagree. Having reviewed all of the documents in their entirety and considered the proposed redactions in their context, I am satisfied that the public interest in non-disclosure exceeds any benefit Mr Tepper might derive from disclosure.

[15] In balancing the benefits of disclosure against the public interest in non-disclosure, I took account of the following factors:

- The probative value of the evidence;
- The nature of the plaintiff's action, including the allegations of government wrongdoing;
- The effect that non-disclosure would have on the public's perception of the justice system; and
- The timing, source, and sensitivity of the information in issue.

(See *Carey v Ontario*, [1986] 2 SCR 637 at para 80; Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis, 2014) at 1059, 1067).

[16] I find that almost all of the proposed redactions relate to information that is simply not relevant to this action. For example, a large proportion of the redactions relate to cases of other Canadian citizens who were in need of consular assistance. While Mr Tepper asserts that that information would be relevant in the sense that it might show that other citizens received more attention and assistance than did he (a suggestion that I do not see reflected in the pleadings), in fact, the information about those other persons contained in the contested documents amounts merely to periodic status reports. Little or none of that information reflects the degree of effort or involvement of Canadian officials in trying to secure the release of those persons or to provide any other assistance they may have sought. I saw nothing that would have advanced Mr Tepper's own claim against the Crown.

[17] Similarly, almost none of the redactions based on foreign or bilateral relations relate in any way to Mr Tepper. There were only a very few comments from foreign officials about Mr

Tepper's situation, but they did not relate in any way to the issues in this action. Again, I saw nothing that would advance Mr Tepper's claim.

[18] Regarding the third head of immunity asserted by the AGC, police communications, there were only five documents involved. Based on my review of them, the information relating to Mr Tepper could be described as boilerplate. There is no analysis or opinions or recommendations or anything else that I could see as being relevant to this action. I saw nothing that would advance Mr Tepper's claim.

[19] In my view, the probative value of all of the evidence in issue in this application is negligible. Clearly, the plaintiff has raised serious allegations of government wrongdoing. However, the redactions proposed by the AGC do not interfere with the plaintiff's capacity to advance his claims. Accordingly, in the circumstances, I do not believe that non-disclosure would have a negative effect on the public's perception of the justice system. While many of the redacted documents were generated during the time when the plaintiff was seeking government assistance, and were authored by senior government officials or advisors, their contents are of little or no relevance or value to the plaintiff. I cannot conclude that the plaintiff's interests in disclosure exceed the public interest in non-disclosure.

[20] Based on having reviewed some unredacted documents, Mr Tepper has referred specifically to several of them that he says contain information that would likely be important to his claim. I will address each of the redactions in these documents with reference to their production numbers:

[21] AGCA 0724: Mr Tepper argues that this document “appears to indicate that the federal government was much more proactive and aggressive in other consular files”. I disagree. In fact, this document mainly contains general information about possible actions that could be taken in consular cases. There is little information regarding other individuals.

[22] AGCA 0860: Mr Tepper says that this document “seems to indicate that in certain cases the federal government did not find it inappropriate to intervene by corresponding with high-ranking officials”. I do not agree with that characterization. The document summarizes the status of other consular cases and makes a single reference to a contact having been made by a head of mission.

[23] AGCA 1791: Mr Tepper submits that this document “shows that where a citizen is detained in non-politically favoured states such as Iran, the federal government has taken a much stronger stance (as shown in Question Period and media lines)”. I do not see a basis for that submission. The document merely provides a status report on other cases and sets out possible media lines parallel to those suggested in respect of Mr Tepper’s case.

[24] AGCA 4110: Mr Tepper maintains that this document “seems to support the idea that the Government’s decision not to intervene in Mr Tepper’s case was influenced by the fact that he was suing the Government of Canada and that its motivations were political considerations”. That is not an accurate description. The document simply sets out information relating to other individuals and a diplomatic communication. It says nothing about Mr Tepper’s law suit.

[25] AGCA 0886 and 0888: Mr Tepper contends that these documents “contain content on whether or not a political visit to Tepper during his incarceration would be advisable”. That is not a valid description of the redacted information. In fact, the redactions relate to a bilateral issue with Lebanon unconnected to Mr Tepper.

[26] AGCA 1108 and 1215: Mr Tepper asserts that these documents “contain no information which could identify a particular consular subject” and “provide a specific example and general information regarding the inhumane detention conditions in Algeria”. That assertion is not well-founded. In fact, both documents contain information about a particular individual. The unredacted portions describe conditions in Algeria, information relating to Mr Tepper, and general issues relating to consular relations with Algeria.

[27] AGCA 1335, 1573 and 2781: Mr Tepper claims that these documents “appear to indicate that the political climate surrounding Lebanon at the time . . . affected the federal government’s actions toward and treatment of the Plaintiff”. In particular, the third document “shows that it intentionally restricted its efforts to non-Hezbollah members” of Parliament. I do not agree with that assessment. The first two documents contain redactions relating to bilateral issues with Lebanon. The third simply contains a question about whether certain Lebanese officials were members of Hezbollah.

[28] AGCB 0324: Mr Tepper, who has not seen this particular document, states that “it is hard to understand how document AGCB 0324 titled “results for TEPPER” could be qualified as irrelevant to this action”. The AGC claims public interest immunity in respect of this document

because it contains information available only to law-enforcement authorities. However, in any case, the information is not particularly revealing. The document merely contains boilerplate information about the Algerian arrest warrant.

[29] In summary, therefore, I am not satisfied that the public interest in disclosing the redacted information to Mr Tepper exceeds the public interest in non-disclosure.

IV. Conclusion and Disposition

[30] Having reviewed all of the 424 documents in issue, I am satisfied that the AGC's assertion of public interest immunity over them, or the redacted portions of them, is justified. Therefore, I will grant the AGC's application with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted, with costs.

"James W. O'Reilly"

Judge

ANNEX

Canada Evidence Act, RSC
1985, c c-5

Impounding of forged
instrument

35. Where any instrument that has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of an officer of the court or other proper person for such period and subject to such conditions as to the court, judge or person admitting the instrument seem meet.

Loi sur la preuve au Canada,
LRC (1985), ch C-5

Dépôt des documents fabriqués

35. Lorsqu'une pièce fabriquée ou frauduleusement altérée a été admise en preuve, le tribunal ou le juge, ou la personne qui l'a admise, peut, à la requête de la personne contre laquelle elle a été admise en preuve, ordonner qu'elle soit déposée au greffe et confiée à la garde d'un fonctionnaire du tribunal ou de toute autre personne, pendant la période et aux conditions que le tribunal, le juge ou la personne qui l'a admise juge convenables.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-517-15

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TEPPER

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