Federal Court Cour fédérale

Date: 20180412

Docket: T-575-17

Citation: 2018 FC 394

Ottawa, Ontario, April 12, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

VB

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant represents himself in this matter. He brings this application pursuant to section 41 of the *Access to Information Act*, RSC, 1985, c A-1 [ATIA] seeking review of the Canadian Security Intelligence Service's [CSIS] response to his request for documents "related to my identity." CSIS interpreted the request as seeking any documents from CSIS' investigational records. CSIS responded by advising the applicant that it would neither confirm

nor deny that such records existed but stated that if they did exist they could reasonably be expected to be exempt from disclosure under the ATIA.

[2] I understand and sympathize with the applicant's frustration in having received a response from CSIS that neither confirms nor denies the existence of records or documents requested. However, I have concluded that the application must be dismissed. For reasons that are set out below and after having reviewed and carefully considered the parties' submissions I am unable to conclude that CSIS erred in addressing the applicant's request for information or that the decision to neither confirm nor deny the existence of the records requested was unreasonable.

II. Background

A. *The request*

[3] In June 2015 the applicant relied on the ATIA to request the disclosure from CSIS of any and all intelligence on him. He reports that he made the request after reading an article in the Toronto Star in May 2015 describing the ATIA request process.

[4] The applicant's ATIA request read as follows:

> I'd like to be provided with documents or be informed about the existence of documents related to my identity. This might include but is not limited to, internet surveillance, publication history, travel history, court history etc or any record where my name [VB] occurs.

[5] CSIS responded to the request in July 2015 and neither confirmed nor denied that any such intelligence records exist, but asserted that if there were such records they would reasonably be expected to be exempt from disclosure under subsection 15(1) or paragraphs 16(1)(a) and (c) of the ATIA. This response letter was brief, the relevant portion stating:

> Based on information contained in your request, please be advised that the CSIS Personal Information Bank listed below was searched with the following results:
>
> **Canadian Security Intelligence Service Investigational Records (CSIS PPU 045)** – Pursuant to subsection 10(2) of the *Act*, we neither confirm nor deny that the records you requested exist. We are, however, advising you, as required by paragraph 10(1)(b) of the *Act*, that such records, if they existed, could reasonably be expected to be exempted under one or more of sections 15(1) (as it relates to the efforts of Canada towards detecting, preventing or suppressing subversive or hostile activities), 16(1)(a) and (c) of the *Act*.

B. *Complaint before the Office of the Information Commissioner*

[6] The applicant filed a complaint with the Office of the Information Commissioner of Canada [OIC].

[7] The applicant's complaint to the OIC does not form part of the record, though the OIC's conclusions are before the Court. The Report of Findings [ROF] states that "[i]n the course of our investigation, we have taken into consideration your representations, as well as the representations made by CSIS on the decision to invoke 10(2)." It appears the complaint was limited to CSIS' reliance on subsection 10(2) of the ATIA to neither confirm nor deny the existence of the records requested.

[8] The OIC investigated and summarized its findings in an ROF dated March 9, 2017. The ROF informs the applicant that the OIC found CSIS' refusal to disclose the existence of any records was reasonable. The OIC further found that by referring to Personal Information Banks [PIBs] in its response to an ATIA request, CSIS had created some confusion for requesters and on this basis classified the complaint as well-founded. The OIC also concluded that the confusion arising from the reference to PIBs did not impact upon the substance of the CSIS decision or render the decision invalid or incomplete. The relevant portion of the ROF states:

> Our investigation has determined that CSIS' reliance on 10(2) is reasonable and that the confirming or denying of the existence of records is subject to subsection 15(1), paragraph 16(1)(a), and paragraph 16(1)(c) of the Act.
>
> However, we also established the CSIS' use of PIBs to respond to these ATI requests was inappropriate. We have met with CSIS officials to discuss its use of Personal Information Banks (PIBs) to respond to access to information (ATI) requests given that it is confusing for requesters and can lead to complaints to our office. CSIS agreed to cease this practice immediately and resume responding in accordance with s. 10 of the Act.

C. *Procedural steps before the Court*

[9] After receiving the ROF, the applicant commenced this application in April 2017.

[10] In June 2017, the respondent brought a motion seeking a confidentiality order. The respondent's motion sought to prevent the disclosure of information in the course of this Court's review of the CSIS decision to neither confirm nor deny the existence of any records sought and CSIS's reliance on sections 15 and 16 of the ATIA to exempt records, if any, from disclosure to the applicant.

[11] Justice Simon Noël issued an Order dated June 28, 2017 authorizing the respondent to file, in addition to its public application record, a secret supplementary affidavit and a secret version of the respondent's factum. Justice Noël's Order further provides that the respondent may make confidential submissions on an *ex parte* basis *in camera,* as provided for at section 52 of the ATIA.

[12] I have had the opportunity to review and consider the secret supplementary affidavit, and the secret version of the factum filed by the respondent. On February 23, 2018, I presided over an *ex parte in camera* hearing in Ottawa where the respondent's affiant appeared.

[13] The applicant sought a redacted copy of the transcript of the *ex parte in camera* hearing. Instead I directed a summary of the hearing be prepared by the respondent based on the transcript. After having reviewed the summary I directed its release to the applicant on March 2, 2018. In correspondence with the Federal Court Registry on March 2, 2018 the applicant indicated some concerns with the summary provided but advised the Court in the course of the public hearing on March 5, 2018 that his focus was on the core issues raised in the application and he did not intend to pursue any concerns with the summary.

[14] Subsequent to the public hearing of the application, the applicant wrote to the Court to indicate that he was seeking damages and any other relief the Court deemed appropriate in addition to costs. In reply the respondent noted that the relief being sought on the application was in the nature of *certiorari* pursuant to section 18.1 of the *Federal Courts Act*, SOR/98-106 [FCA]. The respondent submitted that the Court has no jurisdiction to award damages on an

application for judicial review (*Lessard-Gauvin c Canada (Procureur général),* 2016 FCA 172 citing *Canada (Attorney General) v TeleZone Inc,* 2010 SCC 62). I am persuaded by the respondent's submissions, but having concluded that the application must be dismissed I therefore need not address the availability of damages. Costs are addressed at the conclusion of these reasons.

III. Relevant Legislation

[15] Canadian citizens and permanent residents have a right to access any record under the control of government institutions, subject to exceptions set out in the ATIA (section 4). Where access to records is refused, the government institution is not required to confirm whether the requested records actually exist (subsection 10(2)). But if a government institution in refusing access chooses not to confirm whether records exist, it must also inform the requester of the ATIA provision on which a refusal of access could "reasonably be expected to be based" if the records did exist (paragraph 10(1)(b)).

[16] In this case CSIS informed the applicant that refusal could reasonably be expected to be based on subsection 15(1) and paragraphs 16(1)(a) and (c) if any records did in fact exist.

[17] Subsection 15(1) is a very broad provision capturing information about the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, and the detection, prevention or suppression of subversive or hostile activities.

[18] Paragraph 16(1)(a) protects information arising out of lawful investigations by investigative bodies. Paragraph 16(1)(c) protects information that could be "injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations."

[19] The ATIA also provides that a government institution "shall refuse to disclose any record requested under [the ATIA] that contains personal information as defined in section 3 of the Privacy Act" (subsection 19(1)). This prohibition on the disclosure of personal information is subject to subsection 19(2) which provides that personal information may be disclosed in specific circumstances, including where the individual to whom the information relates consents to the disclosure (paragraph 19(2)(a)).

[20] The ATIA provides that the Information Commissioner, appointed pursuant to section 54 of the ATIA, shall receive and investigate complaints from persons who have been refused access to a requested record (section 30). The Information Commissioner is mandated by Parliament to engage in "impartial, independent and non-partisan investigations" for the purpose of "holding the government accountable for its information practices" (*HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at paras 33 and 34).

[21] On completion of an investigation the Information Commissioner shall report the results of the investigation to the complainant and, where access to the record continues to be refused, advise the complainant of the right to apply to the Federal Court for a review of the matter investigated (subsections 37(2) and 37(5)).

[22] A complainant may within forty-five days after receiving the report of the Information Commissioner apply to the Federal Court for a review of the matter (section 41). The burden of establishing that the refusal to disclose a record requested under the Act is authorized rests with the government institution (section 48).

[23] For ease of reference, relevant sections of the ATIA have been reproduced in the Annex to this Judgment and Reasons.

IV. Positions of the Parties

A. *Applicant's Submissions*

[24] The applicant brings this application pursuant to section 41 of the ATIA submitting that full access should be provided to the records he had requested.

[25] The issues the applicant raises and the relief sought in this application are not limited to a review of CSIS' response to the applicant's ATIA request. The Notice of Application also encompasses issues arising from prior litigation before other courts and in relation to distinctly different matters that are clearly not within the jurisdiction or authority of this Court to address. The limitations of the Court's authority was raised and discussed with the applicant in the course of the public hearing. This Judgment addresses the CSIS decision to neither confirm nor deny that the records sought by the applicant exist and CSIS' hypothetical reliance on sections 15 and 16 to exempt records from disclosure, if they did exist.

B. *Respondent's Submissions*

[26] The respondent submits that the right of access to government information about an individual is subject to the exemptions set out in the ATIA. The respondent further notes that subsection 10(2) of the ATIA provides that a government institution is not required to confirm or deny the existence of records where access has been refused.

[27] The respondent argues, relying on the Federal Court of Appeal's decision in *Ruby v Canada (Solicitor General)*, 187 DLR (4th) 675, 256 NR 278 (FCA), reversed on other grounds 2002 SCC 75 [*Ruby*], that CSIS may reasonably adopt a blanket policy of refusing to confirm or deny the existence of records; to do otherwise would disclose whether an individual is or is not the subject of an investigation. The respondent further submits that this Court has repeatedly upheld CSIS' refusal to confirm or deny the existence of records in the context of national security or law enforcement investigations.

V. Issues

[28] The application raises the following issues:

A. Did CSIS err in concluding that it could rely upon sections 15 and 16 of the ATIA to exempt the records sought, if any such records did exist?

B. Did CSIS reasonably rely on subsection 10(2) when neither confirming nor denying the existence of the records sought?

VI. Standard of Review

[29] The Supreme Court of Canada has long held that the ATIA and the *Privacy Act*, RSC, 1985 c P-21 are parallel statutes that are designed to work together *(Dagg v Canada Minister of Finance,* [1997] 2 SCR 403 at para 47, 148 DLR (4th) 385). The two pieces of legislation contain complementary provisions relating to access to information under government control and are to be interpreted harmoniously in creating a seamless code (*Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at para 22).

[30] The review of a government institution's decision not to disclose a requested record under both the ATIA and the *Privacy Act* engages a two-step process. First the Court must consider whether the information falls within the scope of the exemption relied upon by the government institution. This determination is reviewed against a standard of correctness. If the Court determines that the government institution correctly relied upon the claimed exemption then the Court must consider if the government institution properly exercised its discretion in not disclosing the requested record. This review is conducted against a standard of reasonableness (*Canada (Information Commissioner) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 104 at para 18; *Braunschweig v Minister of Public Safety*, 2014 FC 218 at para 29 [*Braunschweig*]).

[31] A decision to adopt a blanket policy of neither confirming nor denying the existence of a record under subsection 16(2) of the *Privacy Act*, a provision that parallels subsection 10(2) of

the ATIA, involves the exercise of discretion. Such determinations pursuant to subsection 16(2) of the *Privacy Act* are reviewable against a standard of reasonableness (*Ruby* at paras 66-67; *Dzevad Cemerlic MD v Canada (Solicitor General),* 2003 FCT 133 at paras 44-45 [*Cemerlic*], *Westerhaug v Canadian Security Intelligence Service*, 2009 FC 321 at para 17 [*Westerhaug*]). The exercise of this same discretion pursuant to subsection 10(2) of the ATIA is also to be reviewed against a standard of reasonableness.

VII. Analysis

A. *Did CSIS err in concluding that it could rely upon sections 15 and 16 of the ATIA to exempt the records sought, if any such records did exist*

[32] The ATIA provides a broad right of access to records under the control of government institutions. The right to access is subject to limitations broadly recognizing that in some cases the right to access needs to be weighed against other legitimate interests.

[33] The ATIA, as does the *Privacy Act*, provides for two types of exemptions that a government institution may rely upon to refuse disclosure of information; class-based exemptions and injury-based exemptions. These exemptions may either be mandatory or discretionary. The exemptions are described by Justice Simon Noël in *Braunschweig*, where he states at paragraphs 33 and 34:

> [33] Both the Act and the ATIA provide two types of exemptions from disclosure: class-based exemptions and injury-based exemptions. This Court has summarized the distinction between the two classes in *Bronskill v Canada (Minister of Canadian Heritage)*, 2011 FC 983 at para 13, [2011] FCJ No 1199:

> [13] The exemptions laid out in the Act are to be considered in two aspects by the reviewing Court. Firstly, exemptions in the Act are either class-based or injury-based. Class-based exemptions are typically involved when the nature of the documentation sought is sensitive in and of itself. For example, the section 13 exemption is related to information obtained from foreign governments, which, by its nature, is a class-based exemption. Injury-based exemptions require that the decision-maker analyze whether the release of information could be prejudicial to the interests articulated in the exemption. Section 15 is an injury-based exemption: the head of the government institution must assess whether the disclosure of information could "be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities". [Emphasis added.]
>
> [34] In addition, the exemptions under the Act and the ATIA can be categorized as either mandatory or discretionary, depending on the wording of the provision creating the exemption –whether the government "shall refuse to disclose" or "may refuse to disclose". This means that depending on the provision relied upon, the government can be obligated to enforce the exemption or it can have the discretion to decide whether or not to enforce it.

[34] In this case, CSIS received a request for documents "related to my identity." The request included a non-exhaustive list of sources for such information: "internet surveillance, publication history, travel history, court history etc." CSIS concluded the applicant was seeking information from its investigational holdings to determine if he had been investigated by CSIS. This interpretation and the resultant scope of the records review does not appear to have been the subject of complaint before the OIC and has not been raised in this proceeding.

[35] In responding to the applicant’s request CSIS refused to confirm or deny that the records sought exist. CSIS also relied upon subsection 15(1) and paragraphs 16(1)(a) and (c) of the ATIA to advise the applicant that if any records did exist they would be exempt from disclosure.

[36] Subsection 15(1) of the ATIA sets out a discretionary, injury-based exemption with respect to information that could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada, or the detection, prevention or suppression of subversive or hostile activities. CSIS’ hypothetical reliance on subsection 15(1) requires that it demonstrate: (1) any information sought falls within the scope of the exemption; and (2) having demonstrated the exemption is available, that it reasonably concluded disclosure of the information, if any, could be injurious. Paragraph 16(1)(c) also sets out a discretionary, injury-based exception in respect of information that could reasonably be expected to be injurious to the enforcement of any law or the conduct of lawful investigations.

[37] Paragraph 16(1)(a) sets out a discretionary class-based exemption in respect of records obtained or prepared by an investigative body. In relying on this exemption CSIS must: (1) demonstrate that the documents it has exempted from disclosure, if any, contain information that falls within the defined class; and (2) having done so that it reasonably decided not to disclose the information.

[38] The nature of the information sought, CSIS investigative records, is not in dispute. Records of this nature are described by the respondent’s affiant as consisting “predominately of sensitive national security information of the type described in ss 15(1) and 16(1).” This type of

information has been found, albeit in the context of the *Privacy Act*, by Justice Noël "to fall squarely within the description" of the exemptions relied upon (*Llewellyn v Canadian Security Intelligence Service,* 2014 FC 432 at para 33 [*Llewellyn*]). I agree. CSIS investigative records relating to the applicant, if they exist, could reasonably be expected to fall within the exemptions provided for at subsections 15(1) and 16(1) of the ATIA.

[39] I am also satisfied that CSIS did not act unreasonably in concluding, on a hypothetical basis, that it would rely on the subsection 15(1) and 16(1) exemptions to refuse to disclose any of the requested information if any such records did exist. I reach this conclusion having considered: (1) the information sought is information relating to CSIS investigative records; and (2) the evidence set out in the respondent's unclassified affidavit to the effect that releasing such information would jeopardize CSIS investigations by disclosing whether CSIS had or has an investigation in relation to an individual or organization.

[40] Through the respondent's secret affidavit and the *ex parte in camera* hearing I have also had the opportunity to determine if any information does exist and if so to assess the reasonableness of CSIS' reliance on the subsection 15(1) and 16(1) exemptions.

B. *Did CSIS reasonably rely on subsection 10(2) when neither confirming nor denying the existence of the records sought?*

[41] The ATIA expressly recognizes that in responding to a request for records or documents under the control of a government institution, the head of the government institution may decline

to indicate if a record exists (ATIA, subsection 10(2)). A parallel provision is found at subsection 16(2) of the *Privacy Act*.

[42] In considering the *Privacy Act* provision the Federal Court of Appeal has concluded: (1) subsection 16(2) permits a government institution to adopt a policy of neither confirming nor denying the existence of information where the information is of a specified type or nature; (2) adopting such a policy involves the exercise of a discretion; and (3) the discretion must be exercised reasonably (*Ruby* at paras 66-67).

[43] The CSIS practice of neither confirming nor denying the existence of records where the information sought relates to CSIS investigative records has been consistently held to be reasonable where the information has been sought pursuant to the *Privacy Act* (*Llewellyn* at para 37*, Cemerlic* at paras 44 and 45*, Westerhaug* at para 18). The jurisprudence has found that confirming whether such information exists or not would be contrary to the national interest as it would alert individuals who potentially present a security risk as to whether they are the target of a CSIS investigation.

[44] The result should not differ where information, if it were to exist, is requested pursuant to the ATIA instead of the *Privacy Act* as was done here. As noted above the ATIA and the *Privacy Act* are to be interpreted harmoniously in creating a seamless code. They each provide for a government institution to refuse to confirm or deny the existence of records subject to similar conditions. The interest in neither confirming nor denying the existence of records arises based

on the nature of the information being sought. CSIS' reliance on subsection 10(2) of the ATIA, in this circumstance, was reasonable.

[45] The OIC took issue with CSIS making reference to Personal Information Banks in the context of an ATIA request as the PIBs are not provided for in the ATIA. The OIC found that making reference to PIBs in responding to an ATIA request was inappropriate as "it is confusing for requesters and can lead to complaints to our office." This concern does not impact upon my conclusion that CSIS' reliance on subsection 10(2) was reasonable. However, it is worthy of some comment as I believe the PIB reference has caused some understandable confusion on the part of the applicant.

[46] The application record suggests the applicant has interpreted the reference to PIBs as a reference to information banks created for and holding data in relation to him and him alone. The evidence of the CSIS affiant makes clear that this is not the case. PIBs are a creation of the *Privacy Act* that are relied upon to describe types of personal information held. PIBs are not personal to an individual, although an individual's personal information, if any, that meets a PIB description will be identified within that specific PIB.

[47] The PIB reference in the CSIS response is not a confirmation that records of the nature sought are held by CSIS. Instead the CSIS response in neither confirming nor denying the existence of the records opens the door to two equally possible scenarios: (1) the records exist but are not being disclosed on the basis that they are exempt from disclosure pursuant to sections 15 and 16 of the ATIA; or (2) no records exist. The absence of certainty this circumstance

creates may understandably cause frustration to a requester but this situation is not unique to the applicant. As was noted by Justice Russel Zinn in *Westerhaug:*

> [18] The Federal Court of Appeal in *Ruby* held that adopting a policy of non-disclosure was reasonable given the nature of the information bank in question, because merely revealing whether or not the institution had information on an individual would disclose to him whether or not he was a subject of investigation. I agree. If it is in the national interest not to provide information to persons who are the subject of an investigation, then it follows that it is also in the national interest not to advise them that they are or are not the target of an investigation. It is one of the unfortunate consequences of adopting such a blanket policy that persons who are not the subject of an investigation and who have nothing to fear from the government institution will never know that they are not the subject of an investigation. Nonetheless, and as was noted by Justice Kelen, this policy applies to every citizen of the country, and even judges of this Court would receive the same response as was given to Mr. Westerhaug and would not have any right to anything further. [Emphasis added.]

[48] The response the applicant received to the request for investigative records was, as noted by Justice Zinn, the response every Canadian or permanent resident would receive. The reliance on subsection 10(2) was reasonable.

VIII. Costs

[49] The parties have sought costs.

[50] Subsection 53 of the ATIA provides that costs awards are in the discretion of the Court and shall generally follow the event. Subsection 53(2) provides that an unsuccessful applicant may nonetheless be awarded costs where an application raises an important new principle in relation to the ATIA.

[51] The issue raised on this application does not engage an important new principle, nor do the circumstances otherwise warrant an award of costs in favour of the unsuccessful applicant.

[52] While costs normally follow the event, in this case I am not prepared to order costs against the applicant. I am of the view that the respondent's reliance on PIBs created some confusion and played at least some role in the applicant pursuing this matter. I am also mindful that the applicant has advised the Court that he has represented himself in these proceedings out of necessity, not choice. There shall be no award of costs.

JUDGMENT IN T-575-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. Costs are not awarded.

"Patrick Gleeson"

Judge

ANNEX

Access to Information Act, RSC, 1985, c A-1, *Loi sur l'accès à l'information* LRC (1985), ch A-1

Right to access to records	**Droit d'accès**
4 (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is	4 (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :
(a) a Canadian citizen, or	a) les citoyens canadiens;
(b) 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 any record under the control of a government institution.	b) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.
[…]	[…]
Responsibility of government institutions	**Responsable de l'institution fédérale**
(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.	(2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

Where access is refused

10 (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Refus de communication

10 (1) En cas de refus de communication totale ou partielle d’un document demandé en vertu de la présente loi, l’avis prévu à l’alinéa 7a) doit mentionner, d’une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l’information et, d’autre part :

a) soit le fait que le document n’existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s’il n’est pas fait état de l’existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

[…]

Dispense de divulgation de l’existence d’un document

(2) Le paragraphe (1) n’oblige pas le responsable de l’institution fédérale à faire état de l’existence du document demandé.

[…]

International affairs and defence

Affaires internationales et défense

15 (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

15 (1) Le responsable d’une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d’États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d’activités hostiles ou subversives, notamment :

(a) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

a) des renseignements d’ordre tactique ou stratégique ou des renseignements relatifs aux manoeuvres et opérations destinées à la préparation d’hostilités ou entreprises dans le cadre de la détection, de la prévention ou de la répression d’activités hostiles ou subversives;

(b) relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

b) des renseignements concernant la quantité, les caractéristiques, les capacités ou le déploiement des armes ou des matériels de défense, ou de tout ce qui est conçu, mis au point, produit ou prévu à ces fins;

(c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person

c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense, des forces, unités ou personnels militaires ou des personnes ou

responsible for the detection, prevention or suppression of subversive or hostile activities;	organisations chargées de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;
(d) obtained or prepared for the purpose of intelligence relating to	d) des éléments d'information recueillis ou préparés aux fins du renseignement relatif à :
(i) the defence of Canada or any state allied or associated with Canada, or	(i) la défense du Canada ou d'États alliés ou associés avec le Canada,
(ii) the detection, prevention or suppression of subversive or hostile activities;	(ii) la détection, la prévention ou la répression d'activités hostiles ou subversives;
(e) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;	e) des éléments d'information recueillis ou préparés aux fins du renseignement relatif aux États étrangers, aux organisations internationales d'États ou aux citoyens étrangers et utilisés par le gouvernement du Canada dans le cadre de délibérations ou consultations ou dans la conduite des affaires internationales;
(f) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;	f) des renseignements concernant les méthodes et le matériel technique ou scientifique de collecte, d'analyse ou de traitement des éléments d'information visés aux alinéas d) et e), ainsi que des renseignements concernant leurs sources;
(g) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international	g) des renseignements concernant les positions adoptées ou envisagées, dans le cadre de négociations internationales présentes ou futures, par le gouvernement du Canada, les gouvernements

negotiations;

d'États étrangers ou les organisations internationales d'États;

(h) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

h) des renseignements contenus dans la correspondance diplomatique échangée avec des États étrangers ou des organisations internationales d'États, ou dans la correspondance officielle échangée avec des missions diplomatiques ou des postes consulaires canadiens;

(i) relating to the communications or cryptographic systems of Canada or foreign states used

i) des renseignements relatifs à ceux des réseaux de communications et des procédés de cryptographie du Canada ou d'États étrangers qui sont utilisés dans les buts suivants :

(i) for the conduct of international affairs,

(i) la conduite des affaires internationales,

(ii) for the defence of Canada or any state allied or associated with Canada, or

(ii) la défense du Canada ou d'États alliés ou associés avec le Canada,

(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

(iii) la détection, la prévention ou la répression d'activités hostiles ou subversives.

Definitions

Définitions

(2) In this section,

(2) Les définitions qui suivent s'appliquent au présent article.

defence of Canada or any state allied or associated with Canada includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or

activités hostiles ou subversives

potential attack or other acts of aggression against Canada or any state allied or associated with Canada; (défense du Canada ou d'États alliés ou associés avec le Canada) subversive or hostile activities means	
(a) espionage against Canada or any state allied or associated with Canada,	a) L'espionnage dirigé contre le Canada ou des États alliés ou associés avec le Canada;
(b) sabotage,	b) le sabotage;
(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,	c) les activités visant la perpétration d'actes de terrorisme, y compris les détournements de moyens de transport, contre le Canada ou un État étranger ou sur leur territoire;
(d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,	d) les activités visant un changement de gouvernement au Canada ou sur le territoire d'États étrangers par l'emploi de moyens criminels, dont la force ou la violence, ou par l'incitation à l'emploi de ces moyens;
(e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and	e) les activités visant à recueillir des éléments d'information aux fins du renseignement relatif au Canada ou aux États qui sont alliés ou associés avec lui;
(f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada. (*activités hostiles ou subversives*)	f) les activités destinées à menacer, à l'étranger, la sécurité des citoyens ou des fonctionnaires fédéraux canadiens ou à mettre en danger des biens fédéraux situés à l'étranger. (*subversive or hostile activities*)

défense du Canada ou d'États alliés ou associés avec le Canada Sont assimilés à la défense du Canada ou d'États alliés ou associés avec le Canada les efforts déployés par le Canada et des États étrangers pour détecter, prévenir ou réprimer les activités entreprises par des États étrangers en vue d'une attaque réelle ou éventuelle ou de la perpétration d'autres actes d'agression contre le Canada ou des États alliés ou associés avec le Canada. (*defence of Canada or any state allied or associated with Canada*)

Law enforcement and investigations

16 (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(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

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

Enquêtes

16 (1) Le responsable d'une institution fédérale peut refuser la communication de documents :

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) à la détection, la prévention et la répression du crime,

(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;
(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information	c) contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :
(i) relating to the existence or nature of a particular investigation,	(i) des renseignements relatifs à l'existence ou à la nature d'une enquête déterminée,
(ii) that would reveal the identity of a confidential source of information, or	(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,
(iii) that was obtained or prepared in the course of an investigation; or	(iii) des renseignements obtenus ou préparés au cours d'une enquête;
(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.	d) contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire à

la sécurité des établissements pénitentiaires.

[…]

[…]

Definition of investigation

(4) For the purposes of paragraphs (1)(b) and (c), investigation means an investigation that

(a) pertains to the administration or enforcement of an Act of Parliament;

(b) is authorized by or pursuant to an Act of Parliament; or

(c) is within a class of investigations specified in the regulations.

[…]

Définition de enquête

(4) Pour l’application des alinéas (1)b) et c), enquête s’entend de celle qui :

a) se rapporte à l’application d’une loi fédérale;

b) est autorisée sous le régime d’une loi fédérale;

c) fait partie d’une catégorie d’enquêtes précisée dans les règlements.

[…]

Personal information

19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act.*

Renseignements personnels

19 (1) Sous réserve du paragraphe (2), le responsable d’une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l’article 3 de la *Loi sur la protection des renseignements personnels*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it

Cas où la divulgation est autorisée

(2) Le responsable d’une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

a) l’individu qu’ils concernent

relates consents to the disclosure;

y consent;

(b) the information is publicly available; or

b) le public y a accès;

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

Receipt and investigation of complaints

Réception des plaintes et enquêtes

30 (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

30 (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :

(a) from persons who have been refused access to a record requested under this Act or a part thereof;

a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

(b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

b) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;

(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

c) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;

(d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they

d) déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent comme contre-indiqué le délai de communication relatif à la traduction;

consider appropriate;

(d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

d.1) déposées par des personnes qui se sont vu refuser la communication des documents ou des parties en cause sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;

(e) in respect of any publication or bulletin referred to in section 5; or

e) portant sur le répertoire ou le bulletin visés à l'article 5;

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

f) portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

Findings and recommendations of Information Commissioner

Conclusions et recommandations du Commissaire à l'information

37 (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

37 (1) Dans les cas où il conclut au bien-fondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document 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

b) il demande, s'il le juge à propos, au responsable de lui

specified in the report, 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.

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.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint 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.

Compte rendu au plaignant

(2) Le Commissaire à l’information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l’alinéa (1)b), le Commissaire à l’information ne peut faire son compte rendu qu’après l’expiration du délai imparti au responsable de l’institution fédérale.

[…]

[…]

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner

Recours en révision

(5) Dans les cas où, l’enquête terminée, le responsable de l’institution fédérale concernée n’avise pas le Commissaire à l’information que communication du document ou de la partie en cause sera donnée au plaignant, le Commissaire à l’information informe celui-ci de l’existence d’un droit de recours en

shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

révision devant la Cour.

Review by Federal Court

41 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 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 Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Révision par la Cour fédérale

41 La personne qui s’est vu refuser communication totale ou partielle d’un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l’information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(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

48 In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Charge de la preuve

48 Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d’établir le bien-fondé du refus de communication totale ou partielle d’un document incombe à l’institution fédérale concernée.

Privacy Act, RSC, 1985, c P-21, *Loi sur la protection des renseignements personnels*

LRC (1985), ch P-21

Where access is refused

16 (1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(a)

(a) that the personal information does not exist, or

(b) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the information existed,

and shall state in the notice that the individual who made the request has a right to make a complaint to the Privacy Commissioner about the refusal.

Refus de communication

16 (1) En cas de refus de communication de renseignements personnels demandés en vertu du paragraphe 12(1), l'avis prévu à l'alinéa 14a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à la protection de la vie privée et, d'autre part :

a) soit le fait que le dossier n'existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou sur laquelle il pourrait vraisemblablement se fonder si les renseignements existaient.

Existence not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether personal information exists.

Dispense de divulgation de l'existence du document

(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence des renseignements personnels demandés.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-575-17
STYLE OF CAUSE:	VB v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 5, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	APRIL 12, 2018

APPEARANCES:

VB	FOR THE APPLICANT (ON HIS OWN BEHALF)
Melanie Toolsie and Shain Widdifield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT