

Federal Court



Cour fédérale

Date: 20190311

Docket: T-2161-15

Citation: 2019 FC 289

Ottawa, Ontario, March 11, 2019

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**BRADWICK PROPERTY MANAGEMENT
SERVICES INC.**

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to section 41 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA]. The applicant seeks a review of the decisions from the Canada Revenue Agency, Access to Information and Privacy Directorate (ATIP Directorate) denying several requests for third-party information.

II. Background

[2] Starting in 2015, the applicant commenced 17 applications for judicial review relating to 11 Access to Information Requests it filed on or about March 5, 2014 [the 2014 AtIRs]. These 17 applications were consolidated into a single application by two Orders of Prothonotary Milczynski dated February 19, 2016, and November 28, 2016.

[3] The applicant, Bradwick Property Management Services Inc. (Bradwick), and its accountant, Elliot Fromstein (Fromstein), engaged in business since 2003, with Fromstein allegedly providing services for Bradwick under various company names: Candlelight International Real Estate Inc.; Marketing Tools Inc.; Knowble Property Services Inc.; Celebration Enterprises Inc.; 318226 Ontario Limited and Edward Fromm; C, D, E & F Enterprises Inc.; and 1711832 Ontario Ltd. (collectively, the Fromstein Corporations).

[4] The Fromstein Corporations billed Bradwick for a total of approximately \$3 million for services rendered, which Bradwick alleges it has paid in full. However, Bradwick has no records of any communications or agreements between Bradwick and the Fromstein Corporations regarding these services. Bradwick suspects Fromstein may have some records relating to the services which Fromstein disclosed to the Canada Revenue Agency (CRA).

[5] The CRA found that these services were either not rendered or the fees charged for the services were not reasonable. It issued Notices of Reassessment to Bradwick regarding deductions under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] and Input Tax Credits (ITCs) pursuant to the *Excise Tax Act*, RSC 1985, c E-15 [ETA] in relation to the alleged payments.

[6] Bradwick filed Notices of Objection with the CRA in April and May 2013 disputing the disallowance of the deductions and ITCs.

[7] The 2014 AtIRs were directed to the CRA and sought information, answers, and documents related to the Notices of Reassessment. The following table indicates what was sought in each request and the reference number that was assigned by the CRA thereto:

Access to Information Request	CRA Ref. No.
All information, answers and documents provided by Candlelight International Real Estate Inc. to CRA regarding CRA audit of Bradwick	A-069439
All information, answers and documents provided by Marketing Tools Inc. to CRA regarding CRA audit of Bradwick	A-069440
All information, answers and documents provided by Knowble Property Services Inc. to CRA regarding CRA audit of Bradwick	A-069441
All information, answers and documents provided by Elliott Fromstein to the CRA at a meeting on March 6, 2009, at CRA office in North Bay, Ontario	A-069443
All information, answers and documents provided by Elliott Fromstein to the CRA regarding CRA audit of Bradwick Property Management Services Inc.	A-069444
All information, answers and documents provided by Celebration Enterprises Inc. to CRA regarding CRA audit of Bradwick	A-069445
All Auditor's Reports (January 2008 to February 2014)	A-069446
All information, answers and documents provided by 318226 Ontario Limited and Edward Fromm to CRA regarding CRA audit of Bradwick	A-069447
All information, answers and documents provided by C, D, E & F Enterprises Inc. to CRA regarding CRA audit of Bradwick	A-069449
All information, answers and documents provided by 1711832 Ontario Ltd. to CRA regarding CRA audit of Bradwick	A-069451
All information, answers and documents provided by Elliott Fromstein to the CRA regarding 2 Requirements to Provide Information dated April 20, 2010	A-069452

[8] In letters dated from April 9 to May 5, 2014, the ATIP Directorate permitted disclosure of documents and information with some redactions pursuant to sections 16, 19, 20, and/or 24 of the *ATIA*. In June 2014, Bradwick made a number of complaints to the Office of the Information Commissioner (OIC) regarding the redactions. In letters dated from November 13, 2015 to January 29, 2016, the OIC upheld the disclosures permitted by the ATIP Directorate, and made a recommendation to disclose a few extra pages from the A-069441 request. The ATIP Directorate complied with this recommendation.

[9] Still dissatisfied, Bradwick now seeks judicial review by this Court regarding the redactions made by the ATIP Directorate.

III. Decisions under Review

[10] Under the *ATIA*, the OIC does not decide what is to be disclosed, but rather makes non-binding recommendations in that regard. This distinction is important because it signifies that the ATIP Directorate's original decisions are the objects of this judicial review.

[11] Pursuant to the Order of Prothonotary Mandy Ayles dated September 19, 2016 (the Ayles Order), the respondent, the Minister of National Revenue (the Minister), has filed 11 charts detailing the reasons for not disclosing the redacted information, answers, or documents for the 11 2014 AtIRs. The Minister has also provided the charts to Bradwick's counsel on a "counsel's eyes only" basis.

[12] The Minister has also filed unredacted versions of all of the documents in issue. Pursuant to the Ayles Order, these unredacted documents have not been provided to either Bradwick or its

counsel. Accordingly, Bradwick's arguments are made for the most part without detailed knowledge of what has been redacted. I have therefore reviewed particularly closely the redactions and the reasons therefor. I have also kept in mind section 48 of the *ATIA* which provides that the Minister bears the burden of proving that its redactions are authorized.

IV. Issues in Dispute

[13] Bradwick raises the following issues in its memorandum of fact and law:

- A. Whether the Minister was entitled to withhold portions of the information, answers, and documents under subsection 24(1) of the *ATIA*;
- B. Whether an alternative mechanism for disclosure of documents existed under either the *ITA* or the *ETA* which entitled the Minister to withhold disclosure under subsection 24(1) of the *ATIA*;
- C. Whether the Minister was entitled to withhold portions of the information, answers, and documents under subsection 19(1) of the *ATIA*; and
- D. Whether the Minister was entitled to withhold portions of the information, answers, and documents under subsection 20(1) of the *ATIA*.

[14] Though the issue is not raised in its memorandum of fact and law, Bradwick's counsel raised an additional issue in oral submissions:

- E. Whether the Minister was entitled to withhold portions of the information, answers, and documents under paragraphs 16(1)(b) and (c) of the *ATIA*.

[15] The Minister's memorandum of fact and law also responds to an allegation that is included in Bradwick's notices of application: that the Minister "deliberately deleted and

withheld information, answers and documents.” If this allegation by Bradwick is intended to refer to something more than the redactions that are already in issue, such as tampering with documents, there is no evidence to support it, and it can be dismissed on that basis without further discussion. Alternatively, if this allegation is limited to the issues concerning redactions already identified, it is addressed below in dealing with those issues.

V. Standard of Review

[16] Sections 49 and 50 of the *ATIA* are relevant to the standard of review that should be applied in this case. These sections are reproduced here:

Order of Court where no authorization to refuse disclosure found

49 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

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

49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court where reasonable grounds of injury not found

50 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, 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

50 Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), 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 relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

[17] Section 50 contemplates a standard of review of reasonableness for refusal to disclose a record on the basis of certain provisions of the *ATIA* (provisions which turn on reasonable expectations). Section 49 addresses all other provisions of the *ATIA*, and contemplates a determination of whether a refusal to disclose a record was “authorized.”

[18] The parties agree, as do I, that the standard of review to be applied in the present case is reasonableness where the redaction involved an exercise of discretion, and correctness where there is no discretion: see *Husky Oil Operations Limited v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 FCA 10 at paras 15 and 62.

VI. Preliminary Issue – New Argument Raised by Bradwick

[19] At the hearing of the present application, Bradwick raised a new and potentially important argument for the first time. It argues that two letters to the CRA from Fromstein which were provided to Bradwick in redacted form were publicly-available without redactions, and therefore should not have been redacted when provided to Bradwick. Bradwick notes that these letters (dated February 1, 2011 and June 7, 2011, and referred to hereinafter, respectively, as the First Letter and the Second Letter) were made available to the public as part of submissions filed with the Federal Court in matters between the Minister and Fromstein (Court File Nos. T-1436-10 and T-1440-10).

[20] The Second Letter (dated June 7, 2011), filed in unredacted form, is provided in Bradwick's application record. The First Letter (dated February 1, 2011) was not included in unredacted form as part of Bradwick's application record. Instead, at the hearing, Bradwick provided a copy as part of a motion record filed on May 26, 2011, in Court File No. T-1440-10. This motion record sought a finding of contempt against Fromstein for failing to respond appropriately in the First Letter to a pair of Requirements to Provide Information and Documents dated April 20, 2010, that were sent to Fromstein.

[21] Bradwick argues that the First and Second Letters were made available to the public by the Minister, and with the tacit approval of Fromstein, and therefore they were considered non-confidential by both of them. Bradwick relies on this to argue that a related third letter to the CRA from Fromstein (dated November 23, 2013, and referred to hereinafter as the Third Letter) which was provided to Bradwick in redacted form should likewise be treated as non-confidential (and produced without redactions) even though it was never made publicly available.

[22] Because of the potential importance of this new argument, I hesitated at the hearing to exclude it simply because it had not been raised in Bradwick's memorandum of fact and law. Bradwick's counsel indicated that he realized the importance of this argument only in preparing for the hearing the week before.

[23] On the other hand, I was sympathetic to the Minister's submission that it was blindsided by this new argument, and that it had no opportunity to prepare a response. I was particularly sympathetic to this submission because Bradwick's counsel did not explain why he waited until the day of the hearing to make the Minister aware of the new argument, rather than advising the Minister the week before.

[24] In the end, I agreed to hear Bradwick's submissions on the new argument, and to give the Minister an opportunity to prepare and submit responding submissions later in written form. I also gave Bradwick an opportunity to reply in writing to the Minister's responding submissions on the new argument.

[25] In its responding submissions, the Minister objects to Bradwick's new argument on the basis that the failure to have raised it earlier in accordance with the *Federal Courts Rules*, SOR/98-106, prejudices the Minister as the auditor who was responsible for Bradwick's audit, Guy Rocheleau, is now retired and no longer available to respond to Bradwick's assertions.

[26] The Minister's objection can be valid only to the issue of the Minister's or Fromstein's intent that the letters be considered non-confidential. It is not relevant to the simple fact that the letters are available to the public.

[27] For the reasons discussed below (in respect of subsection 20(1) of the *ATIA*), I conclude that the absence of evidence from Mr. Rocheleau is not prejudicial to the Minister. Accordingly, it is not necessary for me to consider the Minister's objection as it relates to intent.

[28] I will exercise my discretion to accept the new argument as it relates to the fact that the First and Second Letters are publicly available. I also agree to consider the unredacted copy of the First Letter that was provided in a motion record from Court File No. T-1440-10.

[29] The substantive effect of the public availability of these two letters will be discussed below in the analysis of the various issues raised by Bradwick.

VII. Analysis

A. *Subsection 24(1) of the ATIA*

[30] Subsection 24(1) of the *ATIA* reads as follows:

**Statutory prohibitions
against disclosure**

24 (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

**Interdictions fondées sur
d'autres lois**

24 (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[31] Schedule II of the *ATIA* identifies both section 241 of the *ITA* and section 295 of the *ETA*. The wording of these two sections is very similar. Section 241 of the *ITA* restricts the disclosure

of “taxpayer information,” whereas section 295 of the *ETA* provides similar restrictions on the disclosure of “confidential information.”

[32] Relevant portions of section 241 of the *ITA* are reproduced here:

Provision of information

241 (1) Except as authorized by this section, no official or other representative of a government entity shall

(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;

(b) knowingly allow any person to have access to any taxpayer information; or

(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or for the purpose for which it was provided under this section.

Evidence relating to taxpayer information

(2) Notwithstanding any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in

Communication de renseignements

241 (1) Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire ou autre représentant d’une entité gouvernementale :

a) de fournir sciemment à quiconque un renseignement confidentiel ou d’en permettre sciemment la prestation;

b) de permettre sciemment à quiconque d’avoir accès à un renseignement confidentiel;

c) d’utiliser sciemment un renseignement confidentiel en dehors du cadre de l’application ou de l’exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l’assurance-chômage ou de la Loi sur l’assurance-emploi, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

Communication de renseignements dans le cadre d’une procédure judiciaire

(2) Malgré toute autre loi ou règle de droit, nul fonctionnaire ou autre représentant d’une entité gouvernementale ne peut être

connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

Communication where proceedings have been commenced

(3) Subsections 241(1) and 241(2) do not apply in respect of

(a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

...

Where taxpayer information may be disclosed

(4) An official may

(a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or

requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

Communication de renseignements en cours de procédures

(3) Les paragraphes (1) et (2) ne s'appliquent :

a) ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-emploi ou de toute autre loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

[...]

Divulgence d'un renseignement confidentiel

(4) Un fonctionnaire peut :

a) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à l'application ou à

enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act, solely for that purpose;

(b) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination;

...

Disclosure to taxpayer or on consent

(5) An official or other representative of a government entity may provide taxpayer information relating to a taxpayer

(a) to the taxpayer; and

(b) with the consent of the taxpayer, to any other person

...

l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-emploi, mais uniquement à cette fin;

b) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à la détermination de quelque impôt, intérêt, pénalité ou autre montant payable par la personne, ou pouvant le devenir, ou de quelque crédit d'impôt ou remboursement auquel elle a droit, ou pourrait avoir droit, en vertu de la présente loi, ou de tout autre montant à prendre en compte dans une telle détermination;

[...]

Divulgence d'un renseignement confidentiel

(5) Un fonctionnaire ou autre représentant d'une entité gouvernementale peut fournir un renseignement confidentiel :

a) au contribuable en cause;

b) à toute autre personne, avec le consentement du contribuable en cause.

[...]

[33] Corresponding relevant portions of section 295 of the ETA are reproduced here:

Provision of information

(2) Except as authorized under this section, no official or other representative of a government entity shall knowingly

(a) provide, or allow to be provided, to any person any confidential information;

(b) allow any person to have access to any confidential information; or

(c) use any confidential information other than in the course of the administration or enforcement of this Part.

Evidence relating to confidential information

(3) Despite any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any confidential information.

Communications where proceedings have been commenced

(4) Subsections (2) and (3) do not apply in respect of

Communication de renseignements

(2) Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire ou autre représentant d'une entité gouvernementale :

a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la fourniture;

b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;

c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente partie.

Communication de renseignements dans le cadre d'une procédure judiciaire

(3) Malgré toute autre loi fédérale et toute règle de droit, nul fonctionnaire ou autre représentant d'une entité gouvernementale ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

Communication de renseignements en cours de procédure

(4) Les paragraphes (2) et (3) ne s'appliquent :

(a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Employment Insurance Act, the Unemployment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition of a tax or duty.

...

Disclosure of personal information

(5) An official may

(a) provide such confidential information to any person as may reasonably be regarded as necessary for the purpose of the administration or enforcement of this Act, solely for that purpose;

(b) provide to a person confidential information that can reasonably be regarded as necessary for the purposes of determining any liability or obligation of the person or any refund, rebate or input tax credit to which the

a) ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-emploi, de la Loi sur l'assurance-chômage ou de toute loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

[...]

Divulgence d'un renseignement confidentiel

(5) Un fonctionnaire peut :

a) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à l'application ou à l'exécution de la présente loi, mais uniquement à cette fin;

b) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à la détermination de tout montant dont la personne est redevable ou du remboursement ou du

person is or may become entitled under this Act;

crédit de taxe sur les intrants auquel elle a droit, ou pourrait avoir droit, en vertu de la présente loi;

...

[...]

Disclosure to person or on consent

Divulgence d'un renseignement confidentiel

(6) An official or other representative of a government entity may provide confidential information relating to a person

(6) Un fonctionnaire ou autre représentant d'une entité gouvernementale peut fournir un renseignement confidentiel :

- (a) to that person; and
- (b) with the consent of that person, to any other person.

- a) à la personne en cause;
- b) à toute autre personne, avec le consentement de la personne en cause.

(1) Publicly-Available Information

[34] The Minister argues that neither section 241 of the *ITA* nor section 295 of the *ETA* sets out an exception to the prohibition against disclosure of information where the information in question is in the public domain. Therefore, the Minister argues, it is correct to redact information under section 241 even if that information is not confidential.

[35] Even though no such exception is explicitly included in these sections, I do not accept that Parliament intended for the Minister to be restricted from disclosing publicly available information.

[36] Under the definition in subsection 241(10) of the *ITA*:

taxpayer information means information of any kind and in any form relating to one or more taxpayers that is

renseignement confidentiel
Renseignement de toute nature et sous toute forme concernant un ou plusieurs contribuables et qui, selon le cas :

(a) obtained by or on behalf of the Minister for the purposes of this Act, or

a) est obtenu par le ministre ou en son nom pour l'application de la présente loi;

(b) prepared from information referred to in paragraph (a),

b) est tiré d'un renseignement visé à l'alinéa a).

but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates and, for the purposes of applying subsections (2), (5) and (6) to a representative of a government entity that is not an official, taxpayer information includes only the information referred to in paragraph (4)(1).
(*renseignement confidentiel*)

N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité du contribuable en cause. Par ailleurs, pour l'application des paragraphes (2), (5) et (6) au représentant d'une entité gouvernementale qui n'est pas un fonctionnaire, le terme ne vise que les renseignements mentionnés à l'alinéa (4)1).
(*taxpayer information*)

[37] The French version of “taxpayer information” is “*renseignement confidentiel*” (confidential information). The French version suggests that this term is not intended to encompass information that is in the public domain.

[38] In addition, it is notable that the respective definitions of “taxpayer information” and “confidential information” in the ITA and ETA are very similar. Under the definition in subsection 295(1) of the *ETA*:

confidential information
means information of any kind and in any form that relates to one or more persons and that is

renseignement confidentiel
Renseignement de toute nature et sous toute forme concernant une ou plusieurs personnes et qui, selon le cas :

(a) obtained by or on behalf of the Minister for the purposes of this Part, or

a) est obtenu par le ministre ou en son nom pour l'application de la présente partie;

(b) prepared from information referred to in paragraph (a),

but does not include information that does not directly or indirectly reveal the identity of the person to whom it relates and, for the purposes of applying subsections (3), (6) and (7) to a representative of a government entity who is not an official, includes only the information described in paragraph (5)(j);

(renseignement confidentiel)

b) est tiré d'un renseignement visé à l'alinéa a).

N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité de la personne en cause. Par ailleurs, pour l'application des paragraphes (3), (6) et (7) au représentant d'une entité gouvernementale qui n'est pas un fonctionnaire, le terme ne vise que les renseignements mentionnés à l'alinéa (5)(j).

(confidential information)

[39] The French version of “confidential information” is once again “*renseignement confidentiel*,” just as in the *ITA*. This reinforces my view that, in these sections, Parliament did not intend to restrict the disclosure of publicly available information. It is not apparent to me why Parliament would have wanted to impose such a restriction. I note that subsection 2(2) of the *ATIA* indicates that the *ATIA* “is not intended to limit in any way access to the type of government information that is normally available to the general public.”

[40] Accordingly, the restrictions in subsections 241(1) and (2) of the *ITA* against disclosure of taxpayer information, and in subsections 295(2) and (3) of the *ETA* against disclosure of confidential information, do not apply to publicly-available information such as the First Letter and the Second Letter. However, the same reasoning does not apply to the Third Letter because it is not available to the public.

[41] Bradwick argues that the Third Letter was not treated consistently in a confidential manner, but this argument is relevant only to the application of paragraph 20(1)(b) of the *ATIA*, as discussed below.

(2) Paragraph 241(3)(b) of the *ITA* and Paragraph 295(4)(b) of the *ETA*

[42] Subsection 241(3) of the *ITA* provides that subsections 241(1) and (2) do not apply “in respect of... any legal proceedings relating to the administration or enforcement of this Act...” Subsection 295(4) of the *ETA* provides for a similar exception.

[43] The parties disagree on whether this exception applies in the present case. Bradwick argues that both the connecting phrases “in respect of” and “relating to” are words of the widest possible scope, citing *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430 at 445-46, 106 DLR (4th) 212 [*Slattery*], and *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193 at 39, and therefore the exception applies in the present proceeding.

[44] In *Slattery*, the Supreme Court of Canada was faced with an action by a trustee in bankruptcy against the bankrupt’s wife. The bankrupt taxpayer was petitioned into bankruptcy by the CRA, to whom taxes were owed. The trustee was seeking a declaration that certain assets registered in the wife’s name were actually property of the bankrupt’s estate, and sought to introduce testimony from two CRA employees. The majority of the Court found that this proceeding was sufficiently connected to the administration or enforcement of the *ITA* for subsection 241(3) to operate to exclude the prohibition against disclosure provided for in subsection 241(1). The reasoning was that the proceeding could have an effect on the amount of assets available to pay the bankrupt’s taxes (see p 451).

[45] In the present case, the proceeding concerns 2014 AtIRs that Bradwick made in order to assist with its objection to CRA’s Notices of Reassessment. Given the guidance in *Slattery* concerning the breadth of the connecting phrases in subsection 241(3) and the facts in that case, I

conclude that the subsection operates likewise here. Bradwick can make the argument that this proceeding concerning AtIRs to assist with Notices of Objection relates to the administration or enforcement of the *ITA* and the *ETA* just as well as could the trustee in bankruptcy in *Slattery* with regard to the information sought in that case.

[46] Accordingly, I conclude that the prohibition against disclosure of taxpayer information provided for in subsection 241(1) of the *ITA*, and the limit on compulsion to disclose taxpayer information provided for in subsection 241(2) of the *ITA*, and the corresponding provisions in subsections 295(2) and 295(3) of the *ETA*, do not apply in the present case.

[47] That said, I keep in mind the following guidance from the Supreme Court of Canada in *Slattery* (at pp 443-444) with regard to section 241 of the *ITA*:

In my view, s. 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).

Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.

[48] Despite the fact that subsections 241(1) and 241(2) do not apply, it does not necessarily follow that all redactions by the ATIP Directorate based on subsection 24(1) of the *ATIA* are improper. The Minister maintains a limited discretion to release (or withhold) confidential information: *Scott Slipp Nissan Ltd v Canada (Attorney General)*, 2005 FC 1477 at para 41

[*Scott Slipp*]. Other provisions within section 241 of the *ITA* and section 295 of the *ETA* permit, but do not oblige, disclosure of information.

- (3) Paragraphs 241(4)(a) and (b) of the *ITA* and Paragraphs 295(5)(a) and (b) of the *ETA*

[49] Paragraphs 241(4)(a) and (b) of the *ITA* and 295(5)(a) and (b) of the *ETA* provide for the disclosure of taxpayer information (or confidential information, as the case may be) that can “reasonably be regarded as necessary for the purpose of” either (i) the administration or enforcement of various Acts, including the *ITA* and the *ETA*; or (ii) determining amounts owing under either Act.

[50] Bradwick argues that the requirements of these provisions are met in this case. Bradwick further argues that, even though disclosure under these provisions is discretionary, no basis for refusing to exercise discretion has been provided.

[51] It should be noted first that, since disclosure under these provisions is discretionary, the standard of review is reasonableness.

[52] Having reviewed the redactions in issue, I find none that withhold information that can reasonably be regarded as necessary to either (i) the administration or enforcement of either the *ITA* or the *ETA*, or (ii) determining the amounts owed by Bradwick under either Act.

[53] Bradwick argues that the redacted information is relevant, and therefore necessary, to its Notices of Objection. Bradwick argues that relevant information will have to be provided if the matter proceeds to the Tax Court, and therefore it should be provided now in order for the Notice of Objection stage of the process to be meaningful: *Scott Slipp* at paras 49-50 and 60-61.

[54] I accept the principle stated in *Scott Slipp*, but it does not necessarily follow that the redacted information in this case should be provided. It is clear that the redactions were limited to information concerning third parties, and it is apparent that this was the reason for withholding this information. Despite Bradwick's arguments, I am not prepared to conclude that it was unreasonable for the Minister to fail to recognize the relevance of the redacted information to Bradwick's Notices of Objection.

[55] Accordingly, I will not order production of the redacted information pursuant to paragraphs 241(4)(a) or (b) of the *ITA* or 295(5)(a) or (b) of the *ETA*.

(4) Subsection 241(5) of the *ITA* and Subsection 295(6) of the *ETA*

[56] Subsections 241(5) of the *ITA* and 295(6) of the *ETA* provide for the disclosure of taxpayer information (or confidential information, as the case may be) (i) to the taxpayer (or the person whom the confidential information relates), or (ii) to any other person with the consent of the taxpayer (or the person whom the confidential information relates).

[57] Bradwick does not argue that the redactions in issue meet either of these requirements. Therefore, Bradwick cannot obtain disclosure based on these provisions.

(5) Conclusion

[58] Any of the redactions in issue that are based on subsection 24(1) of the *ATIA* and withhold information that is in the public domain are improper. This conclusion affects the First and Second Letters, but it does not affect the Third Letter since this letter was never made available to the public. Redactions based on subsection 24(1) of the *ATIA* are otherwise proper.

B. *Alternative Mechanism for Disclosure*

[59] In addition to its other arguments, the Minister argues that Bradwick is not entitled to the information it seeks in this application because it has an alternative method for accessing the requested information; specifically, by making a request to a CRA official.

[60] In support of this argument, the Minister cites *Top Aces Consulting Inc v Canada (National Defence)*, 2012 FCA 75 at paras 13-15 [*Top Aces*]. I do not read *Top Aces* as authority for the proposition that an applicant who fails to pursue an informal process for obtaining documents is disentitled from obtaining them through an AtIR. *Top Aces* discussed an earlier Federal Court of Appeal decision, *Canada (Industry) v Canada (Information Commissioner)*, 2007 FCA 212, in which there were two distinct statutory methods of obtaining the release of information, and a majority of the Court of Appeal had agreed that alternative methods of accessing information operate to the exclusion of the *ATIA*. The real concern in *Top Aces* was that a person seeking the release of information should not be left without any statutory method for accessing it.

[61] In the present case, I am not convinced that the possibility of making an informal request to the CRA constitutes the kind of alternative method of accessing information as could deprive Bradwick of entitlement to information under the *ATIA*.

C. *Subsection 19(1) of the ATIA*

[62] Section 19 of the *ATIA* reads as follows:

Personal information

19 (1) Subject to subsection (2), the head of a government

Renseignements personnels

19 (1) Sous réserve du paragraphe (2), le responsable

institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

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

Cas où la divulgation est autorisée

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

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

(a) the individual to whom it relates consents to the disclosure;

a) l'individu qu'ils concernent 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.

[63] Pursuant to these provisions, the Minister is not permitted to disclose “personal information” as defined in the *Privacy Act*, RSC 1985, c P-21, unless (i) the individual to whom it relates consents, (ii) the information is publicly available, or (iii) section 8 of the *Privacy Act* applies.

[64] The public availability of the First and Second Letters has been discussed above, and is also relevant here. Disclosure of these documents is not prohibited under subsection 19(1) of the *ATIA* because they fall under the exception of paragraph 19(2)(b).

[65] With regard to the exceptions contemplated in section 8 of the *Privacy Act*, Bradwick asserts paragraphs 8(2)(a), (b), and (m), which are reproduced here:

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

...

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

...

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

[...]

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

[...]

[66] The exception provided for in paragraph 8(2)(b) of the *Privacy Act* refers to authorizations to disclose under other acts or regulations. Bradwick cites section 241 of the *ITA*

and section 295 of the *ETA*. This argument is addressed by the analysis in the section above relating to subsection 24(1) of the *ATIA*, and need not be discussed further here.

[67] The exception provided for in paragraph 8(2)(a) of the *Privacy Act* permits disclosure of personal information for use consistent with the purpose for which it was obtained. Bradwick argues that this applies because the information in question was collected “to ensure the proper administration of the *ITA* and *ETA* and for the proper determination of taxes owed under those statutes.”

[68] In my view, this characterization of the purpose for which the personal information in question was collected is too broad. The redactions in this case citing subsection 19(1) of the *ATIA* were made because they concerned persons other than Bradwick. Therefore, it is more appropriate to consider that the purpose for which such information was collected relates to those other persons. Accordingly, I should be asking whether the disclosure that Bradwick seeks is consistent with that narrower purpose. I conclude that it is not, because Bradwick seeks the additional information for the purpose of its own tax situation. Based on my review, the information that is relevant to Bradwick’s tax situation has been produced, and the redactions in issue concern other persons.

[69] This conclusion also permits me to dismiss Bradwick’s third argument under subparagraph 8(2)(m)(i) of the *Privacy Act*, that disclosure of the redacted information in question is clearly in the public interest. In my view, no public interest in disclosure clearly outweighs the invasion of privacy that would result from disclosure of the redacted information in question.

[70] In conclusion, other than in respect of the information that was made publicly available in the First and Second Letters, all of the redactions under subsection 19(1) of the *ATIA* are appropriate. Though subsection 19(2) is permissive, and therefore does not require disclosure, no reason has been suggested to me that the Minister would not exercise its discretion to produce documents that are not confidential.

D. *Subsection 20(1) of the ATIA*

[71] Subsection 20(1) of the *ATIA* reads as follows:

Third party information

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency

Renseignements de tiers

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

a) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en œuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la Loi sur la

Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

gestion des urgences et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[72] Many of the redactions in issue cite paragraph 20(1)(b) of the *ATIA*. I accept Bradwick's argument that the Minister bears the burden of establishing that the requirements for withholding information pursuant to paragraph 20(1)(b) apply here. Those requirements are that the information in question is: (i) financial, commercial, scientific or technical; (ii) confidential; (iii) supplied to a government institution by a third party; and (iv) treated consistently in a confidential manner by the third party: *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 27 FTR 194, 27 CPR (3d) 180 at 197 (FCTD) [*Air Atonabee*].

[73] I address the third requirement (that the information in question was supplied to a government institution by a third party) first because it is simple. There is no doubt that this third requirement is met.

[74] Bradwick argues that the information in question is not financial, commercial, scientific or technical as understood in paragraph 20(1)(b) of the *ATIA*. It argues that paragraph 20(1)(b) should be read in line with the other paragraphs of subsection 20(1) which, it submits, are concerned with confidential information between business competitors, the disclosure of which would put a third party's competitive position into jeopardy.

[75] I disagree. Paragraph 20(1)(c) explicitly contemplates "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party." The inclusion of this wording in paragraph 20(1)(c) and not in the other paragraphs of subsection 20(1) indicates to me that it is not intended to be read into paragraph 20(1)(b). I make the same observation with regard to paragraph 20(1)(d) which contemplates "information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party." None of the other paragraphs of subsection 20(1) of the *ATIA* mentions information that could have an effect on a competitive position.

[76] In my view, all of the information redacted on the basis of paragraph 20(1)(b) constitutes financial and/or commercial information, and there is no reason to read the phrase "financial, commercial, scientific or technical information" in paragraph 20(1)(b) to include other requirements.

[77] Another requirement of paragraph 20(1)(b) of the *ATIA* that is in dispute is confidentiality. Bradwick cites *Air Atonabee* at p 202 for the proposition that:

... whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:

(a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,

(b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

(c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

[78] As discussed above, the First and Second Letters do meet the requirement of confidentiality. As these letters are publicly available, they are not confidential. The same applies to the fourth requirement, that the information was “treated consistently in a confidential manner.”

[79] Also as discussed above, there is no evidence that the Third Letter was ever made available to the public. Therefore, it would seem that it remains confidential.

[80] Bradwick argues that the non-confidential treatment given to the First and Second Letters, and the absence of any objection or request to seal those letters, indicates that the information therein was not treated as confidential by Fromstein and the Fromstein Corporations. That is fine as far as it goes. However, Bradwick goes on to argue that I should infer the same for

the Third Letter because this letter relates to the same Requirements to Provide Information and Documents as did the First and Second Letters.

[81] I am unable to agree. There is no evidence concerning the reason that the First and Second Letters were made available to the public in the first place. It may have been, as Bradwick argues, that the CRA did not consider the information provided in the letters to be confidential. However, this is not certain given the CRA's general responsibilities to maintain the confidentiality of information it receives. Similarly with regard to Fromstein and the Fromstein Corporations, it is possible that they considered the letters to contain non-confidential information. But in the absence of evidence on that point, I find it more likely that they simply did not give the issue much thought.

[82] Moreover, the information contained in the Third Letter is not the same as that provided in the First and Second Letters. Fromstein and the Fromstein Corporations might have been willing to accept the public disclosure of the First and Second Letters, but still wish the Third Letter to be kept confidential. I am not prepared to infer from the public availability of the First and Second Letters that the Third Letter was not "treated consistently in a confidential manner by the third party."

[83] In conclusion, the redactions from the First and Second Letters pursuant to paragraph 20(1)(b) of the *ATIA* are improper, but the redactions from the Third Letter pursuant to this paragraph are appropriate.

E. *Paragraphs 16(1)(b) and 16(1)(c) of the ATIA*

[84] As indicated above, Bradwick did not address redactions made pursuant to paragraphs 16(1)(b) and (c) of the *ATIA* in its memorandum of fact and law. However, its counsel raised the issue in oral submissions.

[85] These provisions are reproduced here:

Law enforcement and investigations

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

...

(b) information relating to investigative techniques or plans for specific lawful investigations;

(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

(i) relating to the existence or nature of a particular investigation,

Enquêtes

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

[...]

b) contenant des renseignements relatifs à des techniques d'enquêtes ou à des projets d'enquêtes licites déterminées;

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) 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

(iii) that was obtained or prepared in the course of an investigation;

...

(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,

(iii) des renseignements obtenus ou préparés au cours d'une enquête;

[...]

[86] These provisions permit the redaction of information regarding investigative techniques or information that could affect a particular investigation.

[87] Bradwick argues that the redactions made pursuant to these provisions are inappropriate because these provisions concern criminal investigations, which is not the case here.

[88] Though I agree that the investigations in issue here are not criminal, Bradwick provides no authority to support its interpretation of paragraphs 16(1)(b) and (c), and I see nothing in the provisions themselves that suggests that they should be read in such a limited way.

[89] In my view, all of the redactions made pursuant to paragraphs 16(1)(b) and (c) of the *ATIA* are appropriate.

VIII. Conclusion

[90] Based on the foregoing analysis, I have concluded that the only redactions in issue that are improper are those from the First Letter and the Second Letter pursuant to subsections 24(1), 19(1), and 20(1) of the *ATIA*. Since these letters were already in the public domain in unredacted form, it was improper to withhold portions of them.

[91] Since Bradwick already has the unredacted First and Second Letters, and since I have heard no reason that I should order that these letters (which were produced in redacted form in response to one of Bradwick's 2014 AtIRs) should be re-produced in the same unredacted form in which Bradwick already has them, I will not order that the Minister make any additional productions or any changes to its redactions.

[92] Despite finding that some of the redactions in issue were improper, I will award costs to the Minister. Apart from the fact that the redactions in issue did not actually deny Bradwick any information (since it already has the unredacted documents in question), I am concerned that this whole issue was raised for the first time at the oral hearing of this matter. This occurred even though Bradwick, by its own admission, had the relevant information at least a week before the hearing. No explanation was provided for springing this issue on the Minister and the Court at the hearing. The result was additional work and delay in reaching a decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application has merit only in respect of information that is already in the applicant's possession.
2. The respondent is not ordered to alter the redactions made in its various responses to the applicant's Access to Information Requests in issue.
3. The applicant shall pay the respondent's costs of the application.

"George R. Locke"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2161-15

STYLE OF CAUSE: BRADWICK PROPERTY MANAGEMENT
SERVICES INC. v MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

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