Federal Court  Cour fédérale

**Date: 20200220**

**Docket: T-883-19**

**Citation: 2020 FC 271**

**Ottawa, Ontario, February 20, 2020**

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

**BETWEEN:**

**DALE MURRAY CUMMING**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Background

[1] The Applicant, Mr. Dale Cumming, represents himself in this matter. He brings this Application for judicial review pursuant to section 41 of the *Privacy Act*, RSC 1985, c P-21.

[2] On March 15, 2018, Mr. Cumming submitted a request to the Royal Canadian Mounted Police [RCMP] seeking access to his personal information under subsection 12(1) of the *Privacy Act*.

[3] By letter dated March 16, 2018, the RCMP confirmed receipt of the request and advised Mr. Cumming that it was undertaking the necessary search of its records. That letter also advised Mr. Cumming that the RCMP would require an additional 30 days over and above the prescribed 30-day time period to respond to the request. Mr. Cumming received no further response. In July 2018, he initiated a complaint with the Privacy Commissioner.

[4] In May 2019—more than a year after Mr. Cumming's request, and well past the maximum 60-day time limit the *Privacy Act* prescribes for a response—the Privacy Commissioner wrote separately to Mr. Cumming and to RCMP Commissioner Lucki. In those letters, the Privacy Commissioner concludes that Mr. Cumming's complaint was "well-founded" and that the RCMP's failure to respond to Mr. Cumming's request was a deemed refusal under subsection 16(3) of the *Privacy Act*. The Privacy Commissioner also informed Mr. Cumming of his right to apply to this Court for a review of the RCMP's deemed refusal.

[5] Shortly afterwards, Mr. Cumming filed the Notice of Application now before the Court seeking an Order requiring the RCMP to release the requested personal information.

[6] In July 2019, the RCMP responded to Mr. Cumming's request for personal information by way of letter. The letter advised that a search of records had been conducted, that all of the

documents to which Mr. Cumming was entitled were enclosed, and that some information was exempt from disclosure pursuant to various provisions of the *Privacy Act*. None of the documents provided to Mr. Cumming are before the Court.

[7] Despite having been provided with some information, Mr. Cumming has pursued the Application. He submits that the disclosure is incomplete and that the RCMP's failure to act was a deliberate delay tactic.

[8] There is insufficient evidence to establish why the delay occurred in this instance. However, it is clear that Mr. Cumming's experience was not unique. The Privacy Commissioner's May 2019 letter to Commissioner Lucki addressed 16 other complaints where it was alleged that the RCMP "failed to respond within the time limit set out under the *Privacy Act*". Like Mr. Cumming, those other complainants had not yet received a response from the RCMP, and the Privacy Commissioner concluded the complaints to be well-founded.

[9] The May 2019 letter also draws to Commissioner Lucki's attention several other outstanding investigations. It states:

> I also wish to draw to your attention that our Office has several other outstanding investigations against the RCMP including several with respect to time limits […] While we have concluded our investigations of the 17 complaints at hand, we are considering next steps with respect to these other complaints. Of particular concern is that despite repeated attempts to obtain information regarding these files from your ATIP officials, our office has not received appropriate responses, and in certain cases has been completely ignored.

[10] The record does not disclose that a specific request or series of requests were inadvertently overlooked, or that these requests were particularly complex. Nothing in the record indicates that the RCMP made any effort to notify Mr. Cumming that it would miss the statutory time limits. The Privacy Commissioner's letter to Commissioner Lucki also expresses concern that the RCMP failed to appropriately respond to the Privacy Commissioner's inquiries in relation to another series of complaints, and in some cases completely ignored those inquiries. Counsel for the Respondent was not in a position to address the issues disclosed in the May 2019 letter.

[11] The RCMP's seeming indifference towards its obligations under the *Privacy Act* is troubling. I have taken the opportunity to highlight the circumstances because they lend weight to Mr. Cumming's concerns with RCMP conduct and the process for accessing personal information. The circumstances deserve Commissioner Lucki's attention if she has not previously acted upon the May 2019 letter.

[12] Despite the RCMP's apparent disregard of its obligations under the *Privacy Act*, for the reasons that follow, Mr. Cumming's Application cannot succeed.

## II. Position of the Parties

### A. *Applicants' submissions*

[13] Mr. Cumming has very ably put forward his arguments. He is concerned that the *Privacy Act* is incapable of providing meaningful and timely access to Canadians who seek access to

their personal information held by government institutions. He argues that the RCMP acted in bad faith by delaying disclosure until after he filed this Application. He takes issue with the content of the disclosed records, which he states include a description that associates him with violence. He objects to the fact that the information from which this association was drawn has not been disclosed and submits that this characterization negatively affects him in any interactions he may have with police. Finally, he argues that the *Privacy Act* unreasonably requires that he identify the location of personal information, submitting that a requestor cannot know what information might exist or where it is located.

[14] In his written submissions, Mr. Cumming has expanded the scope of the relief sought in his Notice of Application. He now seeks costs; judicial review of the redactions; an order striking the statements that associate him with violence; and complete disclosure of personal information from all RCMP divisions, sections, and departments.

B. *Respondent's submissions*

[15] The Respondent submits that the Application is moot. The request for information has been responded to, there is no longer a live controversy between the parties, and although the Court has the discretion to consider an issue that is moot, it should not do so in this case.

[16] The Respondent also submits that any request to review the RCMP's disclosure based on the redactions is premature because the Applicant has not submitted a complaint to the Privacy Commissioner in respect of the disclosure he received in July 2019.

[17] Finally, the Respondent submits that in conducting a section 41 review the Court cannot order the RCMP to strike those portions of the disclosed records that associate the Applicant with violence.

## III. Preliminary matter – amendment of the style of cause

[18] The Applicant has named the Royal Canadian Mounted Police as the Respondent. The Respondent submits that in accordance with Rule 303 of the *Federal Courts Rules*, SOR/98-106 the appropriate Respondent is the Attorney General of Canada. The style of cause is amended to substitute the RCMP for the Attorney General of Canada as the Respondent (*Ménard v Canada (Attorney General),* 2018 FC 1260 at para 41).

## IV. Issues

[19] The application raises two issues:

A. Is the Application moot?

B. Is the relief sought and arising from the RCMP response premature?

## V. Analysis

### A. *The Application is moot*

[20] Mootness arises where a judicial decision will not have a practical impact upon the rights of the parties. This impact on rights must be present both at the time the proceeding is commenced and at the time the matter is determined (*Borowski v. Canada (Attorney General),* 1

SCR 342 at para 15 [*Borowski*]). Where no live controversy exists at the time the matter is determined, the Court will decline to decide the case.

[21] This general approach is subject to judicial discretion to decide a matter that is moot. The exercise of this discretion involves the consideration of three factors: (1) whether there is a persistent adversarial relationship as between the parties; (2) whether the interests of judicial economy favour a judicial determination; and (3) whether a judicial determination in the absence of a live controversy is in keeping with the Court's proper law-making function within the Canadian constitutional framework (*Borowski* at paras 31 to 42).

[22] Section 41 of the *Privacy Act* provides that an individual may apply to the Court for review of a refusal to grant access to information where a complaint has been made to and investigated by the Privacy Commissioner:

| **Review by Federal Court where access refused** | **Révision par la Cour fédérale dans les cas de refus de communication** |
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| **41** Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those | **41** L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le |

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| forty-five days, fix or allow. | proroger ou en autoriser la prorogation. |

[23] Sections 48 and 49 of the *Privacy Act* set out the remedy available where the Court determines that the refusal to disclose information was not authorized:

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| **Order of Court where no authorization to refuse disclosure found** | **Ordonnance de la Cour dans les cas où le refus n'est pas autorisé** |
| **48** Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of a provision of this Act not referred to in section 49, the Court shall, if it determines that the head of the institution is not authorized under this Act to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate. | **48** La Cour, dans les cas où elle conclut au bon droit de l'individu qui a exercé un recours en révision d'une décision de refus de communication de renseignements personnels fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 49, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu; la Cour rend une autre ordonnance si elle l'estime indiqué. |
| **Order of Court where reasonable grounds of injury not found** | **Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré** |
| **49** Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(b) or (c) or 24(a), the Court shall, if it determines that the head of the | **49** Dans les cas où le refus de communication des renseignements personnels s'appuyait sur les articles 20 ou 21 ou sur les alinéas 22(1)b) ou c) ou 24a), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux |

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| institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate. | conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué. |

[24] Justice James Russell reviewed the jurisprudence on the issue of remedy where an application is brought pursuant to section 41 in *Frezza v. Canada (National Defence)*, 2014 FC 32 [*Frezza*]:

> [57] In *Connolly*, above, the [*sic*] Justice MacKay considered the implications of section 41 under the Act. He noted as follows:
>
> > [8] That section must be read together which ss. 48 and 49 which set out the authority of the Court to act where it finds that access to requested personal information has been wrongfully refused. Those provisions limit the Court's authority to ordering that there be access where that has been refused contrary to the Act.
> >
> > […]
> >
> > [12] In sum, since the applicant has received the information he requested to which he was entitled, and that circumstance existed at the time of his application for review under the *Privacy Act*, despite the advice of the Privacy Commissioner of Canada, I find <u>the Court has no remedy to provide to the applicant in regard to delay by the respondents</u> in finally according him access to personal information under the Act.
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> > [Emphasis added.]

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

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

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

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

[Emphasis added.]

[25] This jurisprudence shows that the Court's authority when considering a section 41 application is limited to making a disclosure order. In this case, disclosure has occurred and the Court is not in a position to grant additional relief.

[26] Even if the additional relief were available to Mr. Cumming, his failure to seek that relief in his original Application or by way of amendment presents an obstacle to it being granted. Rule 301 requires that a Notice of Application contain a precise statement of the relief sought as well as a complete and concise statement of the grounds intended to be argued. This ensures the responding party has an opportunity to respond (*Frezza* at paras 54 and 55 and *SC Prodal 94 SRL v. Spirits International B.V.*, 2009 FCA 88 at paras 11 to 15). Mr. Cumming has not sought leave to amend his Notice of Application.

[27] Having received disclosure, Mr. Cumming now takes issue with the adequacy of that disclosure. He is of the view not all relevant documents have been provided and he disputes the propriety of the RCMP's decision to withhold or redact certain information. Does the RCMP's act of granting what Mr. Cumming views as inadequate disclosure render the matter moot? In my view it does.

[28] In *Sheldon v. Canada (Health)*, 2015 FC 1385 [*Sheldon*], Justice René Leblanc considered the very issue that arises here, but in the context of section 41 of the *Access to Information Act*, RSC, 1985, c A-1.

[29] In *Sheldon* a request had been made under the *Access to Information Act*. The requested records were not provided within the required timelines. The Information Commissioner found that there had been a deemed refusal. The applicant initiated an application for judicial review seeking a disclosure order. After the application was filed, the information sought was disclosed in a redacted form. The applicant was dissatisfied with the redactions and in pursuing the application sought an order that the responding government institution disclose the unredacted records. Justice Leblanc held that it is not open to the Court in the context of an application brought on the basis of a deemed refusal to review the nature and content of any subsequent response, however imperfect and incomplete that response may be (*Sheldon* at para 21).

[30] Although separate legislative schemes, the federal *Privacy Act* and *Access to Information Act* are complementary and harmonious (*H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 [*Heinz*] at paras 33 and 34). The interpretation of a provision in the *Access to Information Act* is instructive when considering a parallel provision in the *Privacy Act*.

[31] An application to this Court pursuant to section 41 of the *Privacy Act* requires that a complaint first be made and investigated by the Privacy Commissioner. The Privacy Commissioner's authority under the *Privacy Act* is limited to making recommendations to responding government institutions. Section 41 provides a mechanism whereby an applicant may enforce those recommendations by seeking a disclosure order from the Federal Court. The relief the Court may grant is limited by the terms and context of the Privacy Commissioner's recommendation. To hold otherwise would be to usurp the Privacy Commissioner's role in the complaint scheme and deny the Court the benefit of its expertise in applications. The issues that

now arise as a result of partial disclosure differ in kind from the issue of non-disclosure previously considered by the Privacy Commissioner.

[32] As in *Sheldon*, in this case, the Privacy Commissioner's recommendation relates to a deemed refusal resulting from the RCMP's failure to provide any response to Mr. Cumming's request for personal information. That refusal to respond has been remedied. The controversy that gave rise to the section 41 application has been resolved. The matter is moot. The remedy this Court might award has been provided to the Applicant as it related to the deemed refusal, and there is nothing to indicate that the Court should exercise its discretion to hear the matter in any event.

B. *Is the Application premature?*

[33] Mr. Cumming has not initiated a complaint with the Privacy Commissioner in respect of his concerns with the partial disclosure he has received. Making a complaint to the Privacy Commissioner in respect of a refusal is a condition to a section 41 application (*Heinz* at para 79). Not having submitted a complaint regarding the adequacy of the information provided and in the absence of an investigation by the Privacy Commissioner, it is premature for Mr. Cumming to seek relief from the Court in respect of these issues.

VI. Costs

[34] The Respondent advised in the course of oral submissions that it would not seek costs.

[35] Mr. Cumming has been unsuccessful and normally the unsuccessful party is not entitled to costs. However, Rule 400 provides that the Court has full discretionary power over the amount, allocation and by whom costs are to be paid. The result of the proceeding is but one of the factors identified for consideration.

[36] The RCMP's handling of Mr. Cumming's complaint is relevant when considering costs. In this regard, I note that the RCMP failed to provide Mr. Cumming with any update about or explanation for the delay prior to his complaint or following the conclusion of the investigation. Mr. Cumming shall have costs in the amount of $200 which represent the expenses he incurred in filing this Application and travelling to attend the oral hearing.

**JUDGMENT IN T-883-19**

**THIS COURT'S JUDGMENT is that**:

1. The style of cause is amended striking the Royal Canadian Mounted Police as the Respondent and identifying the Attorney General of Canada as the Respondent;

2. The Application is dismissed; and

3. The Applicant is awarded costs in the fixed amount of $200.

"Patrick Gleeson"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-883-19 |
| **STYLE OF CAUSE:** | DALE MURRAY CUMMING v THE ROYAL CANADIAN MOUNTED POLICE |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | FEBRUARY 11, 2020 |
| **JUDGMENT AND REASONS:** | GLEESON J. |
| **DATED:** | FEBRUARY 20, 2020 |

**APPEARANCES:**

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| Dale Murray Cumming | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Alexander Brooker | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Edmonton, Alberta | FOR THE RESPONDENT |