Federal Court  Cour fédérale

**Date: 20201211**

**Docket: T-1873-18**

**Citation: 2020 FC 1146**

**Ottawa, Ontario, December 11, 2020**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**CRIMINAL TRIAL LAWYERS' ASSOCIATION**

**Applicant**

**and**

**MINISTER OF JUSTICE**

**Respondent**

## JUDGMENT AND REASONS

### Introduction

[1] The Criminal Trial Lawyers' Association (Association) seeks judicial review of a decision of the Access to Information and Privacy (ATIP) Director. The Respondent (Justice Canada or DOJ) refused to disclose the full record of consultations between the federal, provincial and territorial governments on *Criminal Code* amendments relating to the treatment of time spent in remand. The ATIP Director invoked the exemption in section 14 of the *Access to*

*Information Act*, RSC 1985 c A-1 (*Act*) in refusing to disclose the records on the grounds that it would be "injurious to the conduct" of federal-provincial affairs.

[2] For the reasons that follow, this judicial review is granted, as the evidence does not demonstrate that the ATIP Director reasonably exercised the discretion conferred by section 14 of the *Act* in considering the disclosure request.

[3] The Association also asserts a section 2 (b) *Charter* violation, however, as I am granting the judicial review, I decline to address the *Charter* claim.

**Background**

[4] The Criminal Trial Lawyers' Association (Association) is an advocacy organization based in Alberta which represents members of the criminal defence bar.

[5] On April 14, 2009, the Association filed a request under the *Access to Information Act*, RSC 1985 c A-1 for access to the records on consultations between the provincial, territorial and federal governments on the topic of credit for time spent in remand. In particular, the Association requested:

> All records in support of the legislation to restrict credit for time served, the Government has claimed that prisoners held in Remand are either instructing their defence counsel to delay their matters as much as possible or defence counsel are advising their clients to so instruct them or accused persons are otherwise delaying their matters in order to obtain 2:1 credit for pre-trial custody or more.

[6] On May 22, 2009, the ATIP Director refused to disclose any records, stating:

> We reviewed the records relevant to your request and determined that all of the information is exempted from release by virtue of sections 14 federal-provincial affairs, 14(a) federal-provincial consultations or deliberations of the *Access to Information Act.*

[7] The evidence does not indicate if there was any consultation with the provincial and territorial agencies prior to the first refusal to release the records.

[8] In the course of considering the Association's request, two records were identified as being responsive. The first is a 110-page report from 2005 titled: *"The Remand Crisis in Adult Corrections in Canada,"* which was co-authored by the federal-provincial-territorial (FPT) Remand Working Group. The second is a 46-page report consisting of analysis and recommendations for presentation to the federal, provincial and territorial Justice Ministers in November 2007.

[9] In response to the ATIP Director's refusal to disclose the requested records the Association filed a complaint with the Office of the Information Commissioner (OIC) in July 2009.

[10] In September 2009, the OIC provided the DOJ with a Notice of Intention to Investigate and Summary of Complaint pursuant to section 32 of the *Act*. The investigation conducted by the OIC took over 9 years to complete.

[11] In December 2010, on the recommendation of the OIC, DOJ sent letters to the provincial and territorial agencies advising them of the Access to Information request. In this letter, DOJ asked the relevant provincial and territorial agencies if they consented to the disclosure of the records. In these letters, the DOJ referencing section 13 of the *Act*, states as follows:

> Section 13 of the *Access to Information Act* foresees that documents forwarded by the province to the federal government in confidence will only be released with clear provincial consent. The section does, however, imply that in appropriate circumstances such consent should be sought.

[12] In response, all of the provinces and territories consented to the disclosure of the records with the exception of Manitoba and Saskatchewan. Alberta objected to the disclosure of only one portion of the records.

[13] In September 2014, during the course of its investigation, the OIC asked DOJ to consult Manitoba and Saskatchewan again about the disclosure of the records.

[14] In February 2015, DOJ confirmed to the OIC its position that the release of the records could be injurious to the conduct of FPT affairs and that in the absence of consent from all of the provinces and territories, releasing the records would seriously affect relations.

[15] On April 7, 2016, the OIC advised the ATIP Director that certain information contained in the withheld records was publically available. The OIC asked the ATIP Director to demonstrate how the publicly available information continued to meet the test for a disclosure exemption under section 14 of the *Act*.

[16] On June 17, 2016, the ATIP Director advised the Association as follows:

> Further to our review of the exemptions applied, we have determined that additional information pertaining to the Remand Working Group report can be released. Please note that some information continues to be exempted from release pursuant to sections 14 [federal-provincial affairs], and 14 (a) [federal – provincial consultations or deliberations], of the *Access to Information Act*.

[17] It is not clear from the evidence if there was a formal consultation with the provincial and territorial agencies prior to the June 17, 2016 disclosure.

[18] On April 25, 2018, the OIC again wrote to the ATIP Director asking for further information, stating: "we are not yet convinced that all the remaining information qualifies for exemption pursuant to section 14, and especially paragraph 14(a)."

[19] The ATIP Director has maintained the position that the remaining records are exempt from release.

**Decision Under Review**

[20] On September 14, 2018, the OIC issued its final report pursuant to Section 37(2) of the *Act*. The OIC advised the Association that DOJ (referred to as "JUS") had reasonably exercised their discretion. The report states in part:

> JUS officials invoked subsection 14(a) of the act to protect records related to federal – provincial – territorial consultations or deliberations. One of the records was a draft report that was the result of exchanges between Justice Deputy Ministers responsible

> for adult corrections (Federal-Provincial-Territorial). JUS confirmed that those consultations and deliberations are ongoing.
>
> We are satisfied that JUS exercised the necessary discretion albeit not to disclose the remaining portions of the records. In exercising their discretion JUS officials indicated that they had considered the fact that the consultations and deliberations were ongoing and sensitive. In addition, the delegated authority in its expert opinion did not believe the public interest in disclosure outweighed the public's interest in full and frank federal, provincial and territorial confidential discussions. JUS also considered the injury to those discussions that would occur if that context was breached.

**The Evidence**

[21] The Association relies upon the Affidavit of Leanne Fliczuk sworn on November 15, 2018. Ms. Fliczuk's Affidavit attaches correspondence between the Association's Chair, Thomas Engel and DOJ as well as correspondence between Mr. Engel and the OIC.

[22] The Respondent relies upon the following Affidavit evidence:

- Affidavit of Lucie Angers sworn on January 8, 2019;
- Public Affidavit of Francine Farley affirmed on January 8, 2019; and
- Confidential Affidavit of Francine Farley affirmed November 28, 2019 attaching an unredacted copy of the responsive records.

[23] The following is a brief summary of the key points arising from the Respondent's Affidavit evidence.

*Affidavit of Lucie Angers*

[24] Ms. Angers is General Counsel with DOJ in the Criminal Law Policy Section (CLPS). The mandate of the CLPS is to support the Minister of Justice in the development of criminal law and criminal policy. Ms. Angers has been the federal co-chair of the Coordinating Committee of Senior Officials Criminal Justice (CCSO) since 2013. She describes the CCSO as the principal forum for federal-provincial-territorial (FPT) officials to collaborate on criminal law issues.

[25] At paragraph 4 of her Affidavit, Ms. Angers states:

> All CCSO discussions and communications whether in person, over the telephone, or by email, as well as all documents and records provided or developed for discussion or review at CCSO meetings, including all drafts, are considered to be provided and obtained in confidence for FPT government purposes. All CCSO working groups and plenary sessions are started with a specific reference to this rule of confidentiality of the proceedings.

[26] Ms. Angers notes that the CCSO material is not the property of any individual jurisdiction, which is why a consensus was sought on making the FPT records public.

[27] According to Ms. Angers, confidentiality is the primary consideration when assessing whether the release of the documents developed in the FPT context. Ms. Angers states that it would be injurious to the ability to have "full and frank discussions" between the provinces and federal government if the records were disclosed.

*Affidavit of Francine Farley*

[28] Francine Farley, is the ATIP Director with DOJ and has the delegated responsibility, pursuant to section 73 of the *Act* to process the request made by the Association.

[29] Ms. Farley, at paragraph 8 of her Affidavit, states that in determining if the records fell within section 14:

> I considered that since consultations with stakeholders did not result in a consensus to disclose, the release of the information at issue could reasonably be expected to be injurious to the conduct of federal/provincial/territorial affairs in the absence of consent from all the stakeholders, the federal government would seriously be affected by its relations with one or more provincial governments.

[30] At paragraph 17 of her Affidavit, Ms. Farley states that "… CLPS recommended consultation with the Provinces regarding the Records covered by the request since the records were their documents." (emphasis added.)

[31] In December 2010, DOJ sent consultation letters to all the provincial and territorial agencies who were part of the FPT working group. Copies of the letters are attached as exhibits to Ms. Farley's Affidavit. Although the letters were addressed to each agency, the core request was the same in all of the letters and states:

> In processing the request we have located the enclosed records which are of interest…as you were on the Heads of Corrections list involved in the attached report.
>
> Section 13 of the Access to Information Act foresees that documents forwarded by a province to the federal government in confidence will only be released with clear provincial consent. The section does, however, imply that in appropriate circumstances such consent should be sought….

> Because this is one of the circumstances where a specific consideration of the possibility of disclosure seems appropriate, we would be grateful if one of your officials could review the enclosed and inform us whether or not…consents to their disclosure.

[32] Between December 2010 and March 2011, all provinces and territories responded to the DOJ's letter. Saskatchewan and Manitoba were the only provinces who did not consent to disclosure of the records. Alberta agreed to disclose the records with the exception of one portion.

[33] At paragraph 23 of her Affidavit, Ms. Farley states that in March 2011 her office advised the OIC that "… it was maintaining its previous recommendation to withhold the report contained within the records pursuant to section 14 of the *Act*." I note that no reference is made to section 13 of the *Act* being the provision referenced in the letters to the provinces and territories.

[34] In paragraph 35 of her Affidavit, Ms. Farley states that following internal DOJ consultations in June 2014, the CLPS continued to recommend the protection of the documents based on section 14 of the *Act* since "one or more of the provinces did not consent to their release and release in such circumstances would injure Canada's relationship with those provinces."

[35] In September 2014, the OIC asked DOJ to re-consult with Manitoba and Saskatchewan regarding their refusal to consent to the disclosure of the records. It is not clear from the record if this second consultation took place.

[36] However, in June 2016 there was a disclosure of portions of the records. At paragraph 54 of her Affidavit, Ms. Farley states:

> On June 13, 2016 Karen Molzahn [of CLPS] emailed Karen Wallace [ATIP office] to advise that in response to the section 35 letter further consultation had taken place with the Heads of Correction and a recommendation was being made to release the publicly available information, including the cover page, statistical tables included in the report that are currently available on the Internet or made available by the Canadian Centre for Justice statistics, and the section of the report on experiences in other countries.

[37] At paragraph 56 of her Affidavit, Ms. Farley maintains her position that the balance of records could not be disclosed. Ms. Farley explains that she:

> …
>
> g) examined the federal provincial territorial relationship and concluded that releasing the remaining portions of the records would be injurious to federal provincial affairs as the issue of remand was still relevant and a work in progress even after considering the passage of time and not intended to be shared outside the federal provincial territorial forum.
>
> h) considered the fact that the report contained in the records was a collaborative effort between the provincial and federal governments.
>
> i) determined that the information had not been previously disclosed by the stakeholders.
>
> j) considered the results of the consultations which indicated no consensus was reached amongst the provinces as to whether the report could be released.
>
> k) considered that there are numerous challenges to the Criminal Code that provided further evidence that injury would likely occur if the information at issue was disclosed….

**Relevant Legislation**

[38] The relevant legislative provisions are reproduced in Appendix A.

**Issues**

[39] Based upon the submissions of the parties, I would frame the issues as follows:

A. Did the ATIP Director reasonably exercise the discretion granted by section 14 of the *Act*?

B. Is s. 2(b) of the *Charter* engaged?

**Standard of Review**

[40] With respect to the issue of the exercise of discretion, the parties submit, and I agree, that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*), 2019 SCC 65, at para 23).

[41] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The exercise of public power "must be justified, intelligible and transparent" and an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at paras 95-96).

[42] *Vavilov* also states that "while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply 'with the rationale and purview of the statutory scheme under which it is adopted" (para 108).

[43] The section 2(b) *Charter* issue raised by the Association is also considered on the reasonableness standard of review (*Vavilov* at para 57; *Doré v Barreau du Québec*, 2012 SCC 12).

**Analysis**

A. *Did the ATIP Director reasonably exercise the discretion granted by section 14 of the Act?*

[44] The Association argues that the ATIP Director did not reasonably exercise the discretion afforded to her by section 14 of the *Act* on a number of grounds including that she did not consider or balance any of the factors in favor of disclosure.

[45] As a starting point, it is important to highlight the purpose of the *Act* as outlined in section 2(1) as follows:

> The purpose of the Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.

[46] The purpose of the *Act* was expounded upon by the Supreme Court in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 21-22 [*Merck*] where Justice Cromwell sates:

> [21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).
>
> [22] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament.

[47] As noted in *Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 F.C. 427 [*Canada v Canada*], the party seeking to maintain the confidentiality of records has a “heavy burden” and must establish with clear and direct evidence that there will be a reasonable expectation of probable harm from disclosure of specific information (page 476).

[48] Therefore, in carrying out her statutory duty, the ATIP Director was to determine if "disclosure could reasonably be expected to be injurious to the conduct of" FPT affairs. If so, she must then "decide whether having regard to the significance of the risk and other relevant factors, disclosure should be made or refused" (*Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 at para 14).

[49] Based upon the evidence, I am satisfied that the ATIP Director understood that she had discretion on whether or not to disclose the records. In 2016, she exercised her discretion and disclosed some of the records. The real issue is if the ATIP Director reasonably exercised the discretion afforded to her by the *Act*. This determination requires a consideration of the evidence of the alleged harm.

[50] The Court in *Canada v Canada* speaks to the nature of the evidence necessary in support of a section 14 refusal. The Court states as follows on page 479:

> The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

[51] Upon review of the evidence, it is evident that there were two main grounds for the ATIP Director's refusal to disclose the records. The first ground was the lack of a consensus among the provinces and territories regarding the disclosure of the records. The second ground for

refusal was the claim that the FPT consultations and deliberations were confidential and therefore disclosure would harm these relations.

[52] I will first address the lack of consensus or lack of unanimous consent. I note that while this ground is not referenced in the final decision, it was a significant factor throughout the consideration of this access to information request. The lack of consensus as a basis to deny disclosure emerged early on in the processing of the request. Initially the lack of consensus was asserted as a standalone ground to deny disclosure, however, over the course of the intervening years the lack of consensus ground was added to the section 14 confidentiality claim.

[53] On this, the Respondent has not provided any jurisprudence to support its position that a consensus among the provincial and territorial governments is a prerequisite to disclosure under section 14. Likewise, there is no language in section 14 of the *Act* to support such an interpretation. As noted, this ground of refusal arose from the initial consultations with the provincial and territorial agencies in 2010 (para 20 of the Farley Affidavit) where the consultation correspondence references section 13 of the *Act*.

[54] To support the lack of consensus as an appropriate ground of refusal, the Respondent relies upon *Do-Ky v Canada (Minister of Foreign Affairs and International Trade*), [1997] 2 FC 907 (*Do*-Ky) at paragraphs 6-7 where the Court held that it was reasonable to refuse disclosure as being injurious to the conduct of international affairs pursuant to section 15 of the *Act* in light of the "expressed wishes of a foreign government" against disclosure. Unlike in *Do-Ky*, here

there is no “expressed wish” not to disclose the records considering the majority of the provincial and territorial agencies consented to the disclosure.

[55] In relying upon the lack of consensus ground, the ATIP Director failed to consider the fact that the majority of the provincial and territorial agencies actually agreed to the disclosure of the records. It appears that in relying upon this ground, the ATIP Director has conflated the section 14 refusal with the section 13 criteria without explanation. That is not a reasonable approach as it does not bear the hallmarks of a logical and coherent decision making process.

[56] The second ground of refusal relied upon by the ATIP Director is confidentiality. The claim is that FPT consultations in relation to these records were and are confidential. However, this claim appears to be primarily asserted by DOJ officials. There is no direct evidence from any of the member agencies stating this as an outright fact or understanding. The strongest evidence in support of this ground comes from paragraph 8 of Ms. Angers’ Affidavit where she states: “… members of CCSO suggested that the release of information which could reveal a particular government’s position on an issue could call into question their continued participation in this sensitive form.”

[57] The use of the phrase “suggested” is not direct evidence sufficient to support the confidentiality claim. Here, the majority of the participants, when specifically queried about the disclosure of the records, agreed to have the records disclosed and did not raise the issue of confidentiality. Accordingly, the claim that confidentiality is foundational to FPT relations is not borne out by the evidence in relation to these records.

[58] While one might presume that there are, at times "confidential" FPT discussions, in that case, there should be clear evidence in support of this presumption. The Court in *Canada v Canada* cautions against drawing inferences except in the clearest of cases. This is not the "clearest of cases". In any event, even if we presume that some of the discussions were confidential, this presumption implies that some of the discussions were not confidential. The ATIP Director should have turned her mind to the possibility of severance of the records between "confidential" and "non confidential" information. There is no evidence that severance was seriously considered.

[59] On the issue of harm, the ATIP director had to reconcile how disclosure could "reasonably be expected to be injurious" to FPT relations. As noted in *Canada v Canada*, above, "the more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure and the harm alleged". Here there is a lack of specific evidence to support the harm alleged. The general assertion of the confidential nature of the FPT deliberations does not address the specific request in relation to the records sought. It is not enough for the ATIP Director to state that disclosure would be injurious to FPT relations, without specific evidence in support. That evidence is not in the record. It is also unclear from the record whether Ms. Farley turned her mind to the question of the potential harm. The decision did not provide sufficient linkage between disclosure sought and the harm alleged.

[60] Finally, I would note that the record does not disclose that there was due consideration given to the public's interest in obtaining the records. Considering the importance of this topic

as well as the purpose of the *Act*, the evidence does not disclose a reasonable consideration of these interests. The ATIP Director was obligated to balance the alleged "injury" against the purpose of the *Act*. The evidence does not demonstrate that this exercise was undertaken. On the contrary, the evidence points to a desire to protect the records from disclosure because of a possible legal challenge.

[61] Overall, and for the above reasons, I have concluded that the ATIP Director has failed to reasonably exercise the discretion afforded by the *Act*. The decision is not "justified, intelligible and transparent" within the *Vavilov* framework.

B. *Is s. 2(b) of the Charter engaged?*

[62] The Association argues that the issue of remand is a matter of "considerable public interest" and that in refusing to disclose the records the Respondent is in breach of the s. 2(b) *Charter* rights to freedom of thought, belief, opinion and expression and freedom of the press and other media communication.

[63] As this judicial review is being granted, I decline to address the Association's s. 2(b) *Charter* arguments (*Taseko Mines v Canada (Environment)*, 2019 FCA 320 at para 105).

**Conclusion**

[64] This judicial review is granted as I have found that the Respondent has failed to reasonably exercise the discretion conferred by section 14 of the *Act.* Notwithstanding section

50 of the *Act*, and the lengthy period of time that this request was under consideration, it is my view that the appropriate remedy is to return this matter to the Respondent for reconsideration.

**Costs**

[65] As the successful party, the Applicant is entitled to costs. At the hearing, legal counsel for the parties asked to be given the opportunity to make submissions on costs within 5 days of receipt of my decision.

[66] Accordingly, the parties shall have 5 days from the date of this decision to make submissions on costs. In the event they fail to do so the Court will make an order awarding costs without any further submissions of the parties.

**JUDGMENT IN T-1873-18**

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

1. This judicial review is granted and the matter is remitted to the Respondent for redetermination;

2. The Applicant is entitled to costs;

3. The parties shall have 5 days from the date of this decision to make submissions on costs, failing which the Court will set costs.

"Ann Marie McDonald"
Judge

# APPENDIX A

| ***Access to Information Act*** (R.S.C., 1985, c. A-1) | ***Loi sur l'accès à l'information*** (L.R.C. (1985), ch. A-1) |
|---|---|
| Information obtained in confidence | Renseignements obtenus à titre confidentiel |
| **13 (1)** Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains information that was obtained in confidence from | **13 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements obtenus à titre confidentiel : |
| (a) the government of a foreign state or an institution thereof; | a) des gouvernements des États étrangers ou de leurs organismes; |
| (b) an international organization of states or an institution thereof; | b) des organisations internationales d'États ou de leurs organismes; |
| (c) the government of a province or an institution thereof; | c) des gouvernements des provinces ou de leurs organismes; |
| (d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; o | d) des administrations municipales ou régionales constituées en vertu de lois provinciales ou de leurs organismes; |
| (e) an aboriginal government. | e) d'un gouvernement autochtone. |
| Federal-provincial affairs | Affaires fédéro-provinciales |
| **14** The head of a government institution may refuse to disclose any record requested under this Part that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs, including, without restricting the generality of the foregoing, any such information | **14** 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 par le gouvernement du Canada des affaires fédéro-provinciales, notamment des renseignements sur : |

(a) on federal-provincial consultations or deliberations; or

a) des consultations ou délibérations fédéro-provinciales;

(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

b) les orientations ou mesures adoptées ou à adopter par le gouvernement du Canada touchant la conduite des affaires fédéro-provinciales.

Notice of intention to investigate

**32** Before commencing an investigation of a complaint under this Part, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

Avis d'enquête

**32** Le Commissaire à l'information, avant de procéder aux enquêtes prévues par la présente partie, avise le responsable de l'institution fédérale concernée de son intention d'enquêter et lui fait connaître l'objet de la plainte.

Final report to complainant, government institution and other persons

**37 (2)** The Information Commissioner shall, after investigating a complaint under this Part, provide a report that sets out the results of the investigation and any order or recommendations that he or she makes to

Compte rendu au plaignant, à l'institution fédérale et autres personnes concernées

**37 (2)** Le Commissaire à l'information rend compte des conclusions de son enquête, de toute ordonnance qu'il rend et de toute recommandation qu'il formule **:**

(a) the complainant;

a) au plaignant**;**

(b) the head of the government institution;

b) au responsable de l'institution fédérale;

(c) any third party that was entitled under paragraph 35(2)(c) to make and that made representations to the Commissioner in respect of the complaint; and

c) aux tiers qui pouvaient, en vertu de l'alinéa 35(2)c), lui présenter des observations et qui lui en ont présentées;

(d) the Privacy Commissioner, if he or she was entitled under paragraph 35(2)(d) to make representations and he or she made representations to the Commissioner in respect of the complaint. However, no report is to be made under this subsection and no order is to be made until the expiry of the time within which the notice referred to in paragraph (1)(c) is to be given to the Information Commissioner.

d) au Commissaire à la protection de la vie privée si celui-ci pouvait, en vertu de l'alinéa 35(2)d), lui présenter des observations et lui en a présentées.

Toutefois, le Commissaire à l'information ne peut faire son compte rendu ou rendre une ordonnance qu'après l'expiration du délai imparti au responsable de l'institution fédérale au titre de l'alinéa (1)c).

Burden of proof - subsection 41(1) or (2)

**48(1)** In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned.

Charge de la preuve : paragraphes 41(1) et (2)

**48 (1)** Dans les procédures découlant des recours prévus aux paragraphes 41(1) et (2), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document ou des actions posées ou des décisions prises qui font l'objet du recours incombe à l'institution fédérale concernée.

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 Part 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

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

person who requested access to the record, or shall make such other order as the Court deems appropriate.

demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

***Charter of Rights and Freedoms***

**2.**-Everyone has the following fundamental freedoms:

…

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

***Charte Canadienne des Droits et Libertés***

**2.** Chacun a les libertés fondamentales suivantes :

…

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1873-18 |
| **STYLE OF CAUSE:** | CRIMINAL TRIAL LAWYERS' ASSOCIATION v MINISTER OF JUSTICE |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE BETWEEN FREDERICTON, NEW BRUNSWICK AND EDMONTON, ALBERTA |
| **DATE OF HEARING:** | AUGUST 31, 2020 |
| **JUDGMENT AND REASONS:** | MCDONALD J. |
| **DATED:** | DECEMBER 11, 2020 |

**APPEARANCES:**

| | |
|---|---|
| Praveen Alwis | FOR THE APPLICANT |
| Kerry E. S. Boyd | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Engel Law Office<br>Barristers & Solicitors<br>Edmonton, Alberta | FOR THE APPLICANT |
| Attorney General of Canada<br>Department of Justice Canada<br>Prairie Region<br>Edmonton, Alberta | FOR THE RESPONDENT |