Federal Court  Cour fédérale

Date: 20210316

Docket: T-1125-19

Citation: 2021 FC 229

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 16, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CECILIA CONSTANTINESCU

Applicant

and

CORRECTIONAL SERVICE OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Pursuant to paragraph 10(1)(a) of the *Access to Information Act*, RSC 1985, c A-1 [ATIA], one of the grounds for which a government institution may refuse access to a record is the non-existence of the record. While some case law from this Court and the Federal Court of Appeal has raised the possibility that a requester may successfully challenge the alleged non-existence of a record, it does not yet provide a remedy for such situations.

[2] In this case, by way of a notice pursuant to paragraph 7(a) of the ATIA, and in accordance with paragraph 10(1)(a) of the same Act, the Correctional Service of Canada [CSC] advised Cecilia Constantinescu [Ms. Constantinescu] that no records existed in response to her access request.

[3] Ms. Constantinescu is now challenging that response, and pursuant to section 41 of the ATIA, asks this Court to order CSC to provide her with the information sought in her access request or, failing that, to order a search of its premises for the information.

[4] For the reasons that follow, I dismiss the application for judicial review.

II. Facts and proceedings

[5] This is a complex case, so it is best if I provide a detailed summary.

[6] Ms. Constantinescu was a CSC recruit. In the fall of 2014, she attended the Correctional Training Program [CTP] at the CSC Staff College in Laval, Quebec [Staff College] with a view to becoming a correctional officer.

[7] According to Ms. Constantinescu, during the months of October and November 2014, she was the victim of several acts of assault, harassment, intimidation, and abuse during the CTP professional training courses. Among the individuals involved, Ms. Constantinescu complained in particular about inappropriate behaviour of a sexual nature and intimidation by another recruit at the Staff College, the late Pierre-Louis Durdu. The events complained of allegedly occurred on

October 22, 2014, during one of the training courses. Mr. Durdu has since passed away—a fact that Ms. Constantinescu did not discover until April 16, 2020, during a conference call with CSC lawyers in connection with her complaint before the Canadian Human Rights Tribunal [CHRT].

[8] Based on the allegations made by Ms. Constantinescu and after a preliminary review of the facts, by convening order dated November 28, 2014, the Acting Director of the Staff College convened a board of disciplinary investigation to look into the late Mr. Durdu's alleged behaviour toward Ms. Constantinescu.

[9] The report regarding the disciplinary investigation was issued on March 26, 2015 [Investigation Report]. The members of the disciplinary board of investigation found that the investigation [TRANSLATION] "did not lead to a finding of misconduct by Mr. Pierre-Louis Durdu with respect to the Code of Discipline (CD 060), the Values and Ethics Code for the Public Sector, the Professional Standards or any other CSC policy". As a result, the board concluded that [TRANSLATION] "Ms. Constantinescu's allegations could not be supported by collateral facts and cannot be considered likely to have occurred".

[10] I would simply mention that for reasons that may be controversial but are unrelated to the matter before me, Ms. Constantinescu did not provide any testimony during the disciplinary investigation.

[11] In October 2015, Ms. Constantinescu filed a complaint with the Canadian Human Rights Commission [CHRC] based on the same allegations of assault, harassment, intimidation, and abuse that she claims to have experienced during the CTP professional training.

[12] The CHRC recommended that Ms. Constantinescu's complaint be rejected, but on May 31, 2017, it nevertheless referred the matter to the CHRT to have her complaint heard (File number T2207/2917).

[13] In the context of her case before the CHRT, on December 8, 2017, Ms. Constantinescu received documents from CSC, including:

i. Document 20 – Pierre-Louis Durdu's written statement [Statement of Mr. Durdu].

ii. Document 28 – Pierre-Louis Durdu's comments dated April 28, 2015, in connection with the disciplinary investigation report.

[14] It is Document 20—Statement of Mr. Durdu—that is at the heart of this application for judicial review. This document is not dated or signed.

[15] On December 11, 2017, Ms. Constantinescu emailed CSC's legal counsel and posed a series of questions regarding the documents received, including the following:

> [TRANSLATION]
> On what date was Durdu's statement (your attached Exhibit 20) produced and what were the conditions of its production: the place, was he accompanied by counsel or a union representative? Is this document the result of an examination or did he write it at home, for example?

[16] On January 8, 2018, following a series of email "reminders" from Ms. Constantinescu, one of which asked CSC attorneys to [TRANSLATION] "stop obstructing me in obtaining documents", they responded as follows to that particular question:

> [TRANSLATION]
> Mr. Durdu's comments were received by CSC on April 29, 2015. We do not know under what circumstances these comments were produced.

[17] It is clear that the response from CSC's counsel was referring to Document 28, while Ms. Constantinescu's question was in relation to Document 20. However, what may have been simple carelessness on the part of the counsel for CSC has been elevated to the level of an epic Cecil B. DeMille movie.

[18] Dissatisfied with the response she had received and hearing nothing more from CSC, on January 31, 2018, Ms. Constantinescu wrote to the Minister of Justice recounting her story, specifically the history of her accusations against CSC and her frustration with CSC's counsel, whom she accused of manipulating records and submitting questionable documents into evidence.

[19] It appears that Ms. Constantinescu did not hear back from CSC's counsel or the Minister of Justice. On February 20, 2018, she therefore filed a complaint with the CHRT reiterating the request she had made to CSC's counsel on December 8, 2017, which was aimed at obtaining a number of clarifications from CSC regarding the Statement of Mr. Durdu, namely:

a) documents attesting to the creation date of the Statement of Mr. Durdu;

b) documents attesting to the place where the Statement of Mr. Durdu was created;

c) the conditions of the creation of the Statement of Mr. Durdu and the identities of the persons present at the time of its creation; and

d) a copy of the written notes or a transcript of the audio recording that led to the creation of the Statement of Mr. Durdu.

[20] On March 13, 2018, the CHRT dismissed Ms. Constantinescu's motion (2018 CHRT 8) on several grounds, but nevertheless observed that it "is important to understand that the disclosure of documents process is different from the admissibility of evidence process at the Tribunal hearing . . . ". Ms. Constantinescu did not seek judicial review of that decision.

[21] On April 16, 2018, Ms. Constantinescu filed a motion asking the CHRT to suspend the proceedings indefinitely, until all the documents and information she had requested were provided by CSC. She also asked the CHRT to order CSC to provide her with all documents related to her case.

[22] On April 26, 2018, the CHRT dismissed that motion (2018 CHRT 10). On May 24, 2018, Ms. Constantinescu applied for judicial review of that decision (T-976-18). On November 22, 2018, this Court granted CSC's motion for dismissal and ordered that Ms. Constantinescu's application for judicial review be dismissed with costs. That decision was not appealed.

[23] On July 26, 2018, following two conference calls with the parties, the CHRT concluded that CSC had fulfilled its disclosure obligations regarding, in particular, the Statement of Mr. Durdu and the testimony given by Mr. Durdu. On August 27, 2018, Ms. Constantinescu sought judicial review of that decision (T-1571-18). On November 22, 2018, this Court granted CSC's motion for dismissal and ordered that Ms. Constantinescu's application for judicial

review be dismissed with costs. Ms. Constantinescu's appeal was dismissed with costs by the Federal Court of Appeal on December 17, 2019 (*Constantinescu v Canada (Attorney General)*, 2019 FCA 315).

[24] Incidentally, on September 27, 2019, Ms. Constantinescu filed a motion to amend 17 interlocutory decisions previously rendered by the CHRT, including the March 13, 2018, decision regarding the Statement of Mr. Durdu (2018 CHRT 8). She also asked the CHRT to order a search of CSC offices if certain documents were not complete in order to access the requested documentation. It is interesting to note that Ms. Constantinescu is making the same request before me in this application for judicial review.

[25] CSC objected to the motion, considering it an abuse of process.

[26] On December 16, 2019, the CHRT dismissed Ms. Constantinescu's motion (2019 CHRT 49). In issuing its ruling, the CHRT noted "that some of these [17 interlocutory decisions] were given particular attention by [the CSC] in its submissions (e.g. the application regarding Mr. Durdu's written statement)". The CHRT also observed at paragraph 121 of its decision:

> I would add that it seems that Ms. Constantinescu is duplicating processes in multiple venues because she wants certain documents at all costs. For example, following the Tribunal's decision regarding Mr. Durdu's statement (2018 CHRT 8), she also filed a complaint with the Office of the Information Commissioner of Canada to obtain the same documents that had been refused by the Tribunal. The OICC rejected her application and concluded that the Respondent's searches were reasonable and that no documents matching this request were found.
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> [Emphasis added.]

[27] Indeed, approximately 18 months earlier, on June 27, 2018, Ms. Constantinescu had submitted an access to information request [Access Request] to CSC seeking all documents related to the Statement of Mr. Durdu containing the following elements:

a) the date on which it was created;

b) the institution before which Mr. Durdu made it;

c) the place where Mr. Durdu made it; and

d) the individuals who were present when Mr. Durdu made it.

[28] It should be noted that what Ms. Constantinescu is seeking is information concerning the Statement of Mr. Durdu. However, since the ATIA only provides for access to records, the Access Request is specifically for any record that confirms or contains the information she is seeking (subsection 4(1) of the ATIA).

[29] On August 22, 2018, after searching for the requested information, the CSC Access to Information and Privacy Division [CSC ATIP Division] informed Ms. Constantinescu that it had no records related to her access request [CSC Decision of August 22, 2018].

[30] On August 27, 2018, Ms. Constantinescu filed a complaint with the Information Commissioner of Canada pursuant to subsection 30(1) of the ATIA as it then read, alleging that CSC's search in response to the Access Request was incomplete [Complaint].

[31] On February 19, 2019, Ms. Constantinescu also submitted an ATIP request to the Department of Justice that was similar to the one submitted to CSC. On March 27, 2019, the

Department of Justice informed Ms. Constantinescu that it had no records responsive to this second access request. No application for judicial review was filed with respect to that decision.

[32] On May 27, 2019, the Acting Director of Investigations for the Office of the Information Commissioner of Canada [OIC], pursuant to subsection 37(2) of the ATIA as it then read, informed Ms. Constantinescu of the outcome of her investigation into the Complaint and reported that the OIC had concluded that CSC had conducted a reasonable search and that no records responsive to the Access Request had been located [OIC Decision of May 27, 2019].

[33] On July 11, 2019, Ms. Constantinescu filed this application for judicial review of the OIC Decision of May 27, 2019. Pursuant to a direction from this Court, Ms. Constantinescu amended her application for judicial review on October 28, 2019, to clarify that the subject of the application was in fact the CSC Decision of August 22, 2018.

[34] On November 7, 2019, Prothonotary Steele also denied the respondent's motion to dismiss that had been filed on September 9, 2019, prior to the amendment of Ms. Constantinescu's application for judicial review. It is therefore indeed the CSC Decision of August 22, 2018, that is the subject of this application for judicial review.

[35] A hearing was scheduled for this matter on September 24, 2020. Two weeks before the hearing, Ms. Constantinescu filed a motion for an order directing two Department of Justice lawyers to testify at the hearing scheduled for September 24, 2020. I denied her motion on September 15, 2020.

III. Issue

[36] Is there any evidence, beyond mere suspicion, that the information sought through the Access Request exists and is in the possession of CSC?

IV. Preliminary questions

[37] The respondent contends that paragraphs 1 to 4, 17 to 19, 21(e) to 21(n), 22, 26, and 27 of Ms. Constantinescu's amended affidavit contain either opinions or facts not supported by the evidence or not relevant to this proceeding. The respondent therefore requests that we not consider all of these facts and the exhibits in support of these allegations.

[38] To a large extent, I agree with the respondent. Most of the facts and opinions set out in these paragraphs by Ms. Constantinescu, while they add colour to the record, are not necessary to the resolution of this case. I will therefore not consider them in my assessment of the issues, except possibly in presenting the facts to put the issues in context.

[39] The respondent also asks this Court to amend the style of cause to list CSC as respondent rather than the Attorney General of Canada. In the absence of an objection from Ms. Constantinescu, I will grant this request.

V. Applicable law and jurisdiction of the Court

[40] Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, received Royal Assent and came into force on

June 21, 2019 [the June 21, 2019, amendments], approximately three weeks prior to the filing of this application for judicial review, on July 11, 2019.

[41] Neither party has suggested that the June 21, 2019, amendments would affect Ms. Constantinescu's rights in this case. From my perspective as well, these recent amendments have no impact on the analysis or outcome of this application.

[42] To simplify the Court's analysis, therefore, given that the entire procedural history pertaining to the Access Request occurred prior to the ATIA amendments, I will refer to the provisions of the ATIA that were in effect prior to the June 21, 2019, amendments. I have cited the relevant sections of the ATIA, both before and after the June 21, 2019, amendments, in the appendix to my decision.

[43] It should be noted that CSC has not invoked an exemption in this case to refuse to disclose records, and that no discretionary decision on the part of the government institution is at issue. This is purely and simply a refusal to disclose based on the non-existence of the requested record (paragraph 10(1)(a) of the ATIA).

[44] The scope of the Court's jurisdiction must be considered in all applications under section 41 of the ATIA, and in the case of a refusal pursuant to paragraph 10(1)(a) of that Act, must be addressed under section 49. This Court's only authority to compel the disclosure of government records is found in the ATIA.

[45] On the other hand, this Court has jurisdiction to hear an application for review under section 41 of the ATIA, including a refusal to disclose based on the allegation of non-existence of documents (paragraph 10(1)(a) of the ATIA). In *Canada (Information Commissioner) v Canada (Minister of Environment)*, 2000 CanLII 15247 (FCA) [*Ethyl Canada*] (leave to appeal refused in *Canada (Information Commissioner) v Canada (Minister of the Environment)*, [2000] SCCA No 275), the Federal Court of Appeal observed at paragraph 14:

> Indeed, the Minister refused to disclose the Discussion Papers on the ground that such documents did not exist and gave to Ethyl notice to that effect pursuant to paragraph 10(1)(*a*) of the Act. Under paragraph 42(1)(*a)* of the Act, the Commissioner may apply for judicial review of "any refusal" to disclose a record requested under the Act. Thus, the Court has jurisdiction to review a refusal to disclose based on the allegation of non-existence of documents.
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> [Emphasis added.]

[46] The Information Commissioner's remedies under section 42 of the ATIA are for all intents and purposes equivalent to the remedies available to Ms. Constantinescu in this case under section 41. Moreover, under the ATIA, the fact that the record does not exist is a specific reason justifying refusal to disclose.

[47] The case law of this Court is consistent to the effect that in the absence of a refusal to disclose and pursuant to section 41 of the ATIA (now subsection 41(1)), this Court does not have jurisdiction to review a decision of a government institution on a matter relating to an ATIA request; the refusal to disclose information is a condition precedent to an application under section 41 of the ATIA (*X v Canada (Minister of National Defence)* (1991), 41 FTR 73 at para 10 [*Re X*]). As Justice Barnes observed in *Friesen v Canada (Health)*, 2017 FC 1152 at para 10 [*Friesen*], "[w]ithout exception, those decisions have held that the Federal Court can

only provide relief to an applicant where there has been an unlawful refusal to disclose an identified record".

[48] The jurisdiction conferred on the Court by section 41 of the ATIA relates to the power to grant remedies under sections 49 and 50 of that Act (*Re X* at para 10; *Wheaton v Canada Post Corp.*, [2000] FCJ No 1127, 2000 CanLII 15912 (FC) at para 8 [*Wheaton*]; *Blank v Canada (Department of the Environment)*, 2000 CanLII 16437 (FC) at para 15 [*Blank 2000*]; *Doyle v Canada (Human Resources and Skills Development Canada)*, 2011 FC 471 at p 9 [*Doyle*]).

[49] In *Olumide v Canada (Attorney General)*, 2016 FC 934, [2016] 6 CTC 1 [*Olumide*], this Court stated at paragraphs 18 and 19:

> [18] To the extent the application is an application pursuant to s 41 of the *ATIA* for judicial review of the CRA's refusal to disclose the telephone records requested, I am satisfied that it is plain and obvious that it cannot succeed. Our Court has made it clear on a number of occasions that where, in response to a request for information (whether under the *ATIA* or the *Privacy Act*, RSC 1985 c P-21), a department responds that a record does not exist, such a response does not constitute a refusal of access. Absent a refusal, the Court does not have jurisdiction in judicial review pursuant to s 41 of the *ATIA* or the *Privacy Act*, unless there is some evidence, beyond mere suspicion, that records do exist and have been withheld. See *Clancy v Canada (Minister of Health)*, 2002 FCJ No 1825, *Wheaton v Canada Post Corp*, 2000 FCJ No 1127, *Doyle v Canada (Minister Human Resources Development)*, 2011 FC 471, *Blank v Canada (Minister Environment)*, 2000 FCJ No 1620.
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> [19] As mentioned, it is plain that the "refusal" here is based on the CRA's conclusion that no records such as those requested exist, and the Information Commissioner's report of investigation agrees with that conclusion. No evidence, or even cogent argument, has been submitted by the Applicant to support a conclusion that the records exist or are being withheld. It is plain and obvious that this Court can have no jurisdiction in this matter pursuant to s 41 of the *ATIA*.
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> [Emphasis added.]

[50] I accept the principle established in *Olumide* that in the absence of a refusal, this Court has no jurisdiction in judicial review under section 41 of the ATIA. However, with respect to the suggestion that a response from the government institution that the records do not exist "does not constitute a refusal of access", further clarification is required.

[51] In my view, a distinction must be made between, on the one hand, a refusal to disclose based on the allegation of non-existence of documents within the meaning of paragraph 10(1)(a) of the ATIA and, on the other hand, the case where the government institution has in fact disclosed records to the individual in response to a request and either the individual is not satisfied with the disclosure and suspects that other records are being withheld by the government institution, or the individual objects to the redaction of the records and to the exemptions to the disclosure of the information by the government institution.

[52] As Justice Strayer observed in *Re X* at paragraph 13, "unless there is a genuine and continuing refusal to disclose, and thus an occasion for making an order for disclosure or its equivalent, no remedy can be granted by this Court" [emphasis added].

[53] The government institution's assertion that the non-existence of additional records is due to the fact that it has already disclosed all relevant records to the requester and there are no further records responsive to the access request, or that the requested records had been previously destroyed, or where there has been a delay in releasing records in response to the access request but the requested records were nevertheless released to the requester prior to the hearing of the application for judicial review, do not constitute refusals allowing for an

application for review under section 41 of the ATIA (*Creighton v Canada (Superintendent of Financial Institutions)*, [1990] FCJ No. 353 (TD) [*Creighton*]; *X v Canada (Minister of National Defence)* (1991), 41 FTR 16; *Re X* at pp 76 and 77; *Wheaton* at para 16; *Blank 2000* at para 19; *Clancy v Canada (Minister of Health)*, 2002 FCT 1331 at para 17 [*Clancy*]; *Doyle*; *Albatal v Canada (Citizenship and Immigration)*, 2014 FC 1026); *Friesen*; *Tomar v Canada (Parks Canada Agency)*, 2018 FC 224 at para 49 [*Tomar*].

[54] The aforementioned cases did not involve a refusal of access based on the alleged non-existence of records as provided for in paragraph 10(1)(a) of the ATIA; they are therefore not cases of a "genuine and continuing" refusal giving rise to a remedy under section 41 of the ATIA. Rather, the Court is called upon to examine the evidence to verify the government institution's assertion that there are no other records in the context of determining whether the Court has jurisdiction to hear the case. Part of this test is whether the suspicions are supported by evidence, or whether they are simply unfounded suspicions that "do not stand up to scrutiny" (*Tomar* at para 46; *Creighton*).

[55] If there is no valid reason to question the government institution's assertion that there are no other records beyond those already disclosed, there is no "genuine and continuing" refusal on the part of the government institution to disclose records since records have already been disclosed. Without such refusal, this Court does not have jurisdiction under section 41 of the ATIA.

[56] *Wheaton* and *Blank 2000* did not raise the issue of refusal of access based on the alleged non-existence of records. In fact, the applicants did not even plead refusal of access. However, they were equally unable to refute the assertion that they had received all the records in the possession of the government institutions in response to their access to information requests. The Court concluded that the unrefuted evidence indicated that the applicant had received all relevant records in the possession of the government institution, and therefore dismissed the application for review given that the condition precedent for filing it under section 41 of the ATIA had not been met.

[57] In *Doyle* as well, documents were disclosed in response to the access request, but some pages of a report were missing. However, there was no reason to believe there was anything suspicious about the absence of these pages. The applicant even acknowledged that there was no obvious reason for the government institution to delete the parts of the record that had not been produced, and the Court was satisfied with the government institution's explanation regarding its unsuccessful efforts to locate the records.

[58] As in *Wheaton* and *Blank 2000*, the *Doyle* case involved evidence accepted by the Court as to why the records sought did not exist following the disclosure of other records by the government institution in response to the access request. Citing *Creighton*, Justice Barnes confirmed that mere suspicion of abuse and bad faith is insufficient to overcome strong evidence to the contrary, namely that all of the records that are the subject of the access request have been disclosed. Again, with respect to this case law, there was no question, at the time of the hearing

and after consideration of the evidence before the Court, of a refusal within the meaning of section 41 of the ATIA.

[59] In *Clancy*, the applicant received the following response to her access request: the records she sought no longer existed after a period of more than ten years, and such records are destroyed every six years according to law. The Court considered this response, as well as the evidence adduced by the applicant to support her argument that the government institution was withholding records, and struck her application for review "since there was no 'refusal' to provide information as required by s. 41" of the ATIA. The Court found that "[t]he fact that the applicant has in her possession the above noted documents—the list of chemicals and government inspection reports dating from the 1970s—does not constitute proof of her allegation that the department is withholding information".

[60] In *Tomar*, the applicant had also received records in response to her access request but, suspecting that others existed, asked this Court to order the government institution to conduct another search of its records. As to whether the Court even had jurisdiction to make such an order, Justice Elliott concluded that "[n]one of Ms. Tomar's beliefs or suspicions that further records should exist are supported by the evidence. They also do not stand up to scrutiny" (*Tomar* at para 46).

[61] I do not believe that this case law teaches that a statement by a government institution that a record does not exist will in all cases preclude any remedy from this Court under

section 41 of the ATIA. In my view, this would be contrary to paragraph 10(1)(a) of the ATIA, as well as the decision in *Ethyl Canada*.

[62] Rather, I am of the view that this case law supports the specific proposition that confirmation by a government institution that no further records exist after an initial disclosure of records is not, in the words of the Federal Court of Appeal in *Ethyl Canada*, a "refusal to disclose based on the allegation of non-existence of documents". This case law teaches that in such cases, and where there is evidence that the records in question do not exist or where there is only an unsupported suspicion that the records do exist, the assertion that the records in question do not exist does not constitute a refusal and is not subject to any remedy before this Court under section 41. The Court therefore has no jurisdiction to review the government institution's decision in these circumstances.

[63] In short, a refusal to disclose records under paragraph 10(1)(a) in response to an access request, accompanied by a notice under paragraph 7(a) that the record does not exist, is indeed a refusal to disclose, and the Court has jurisdiction to hear the application for review under section 41 of the ATIA. However, there is no refusal where, following disclosure of records in response to an access request, the government institution states that no further records exist. In the latter case, this Court has no jurisdiction under section 41 of the ATIA unless there is evidence, beyond a bald suspicion, that the records exist and have been withheld.

[64] In other words, a refusal to disclose on the basis that the requested record does not exist is still a refusal that gives rise to a remedy under section 41 of the ATIA when the refusal is made

pursuant to paragraph 10(1)(a) and communicated under paragraph 7(a) of the ATIA, as in this case.

[65] In *Re X*, the issue was resolved prior to the Court hearing; the documents that did exist and were responsive to the request were eventually released to the applicant. In *Wheaton*, *Blank 2000*, *Doyle*, *Clancy* and *Friesen*, the documents themselves were found to be unavailable, either because they no longer existed or because additional documents had never existed.

[66] That said, the applicant must still demonstrate that the assertion that the requested records do not exist is in fact a pretext for refusing disclosure. If the applicant does not meet her burden of proof in this regard, the application for review must nevertheless be dismissed. Moreover, as the Federal Court of Appeal observed in *Ethyl Canada* at paragraph 14, "Parliament cannot have intended that the Court would have the relevant evidence to exercise its supervisory function only in the case of refusals based on statutory exemptions, but not in the case of refusals based on non-existence".

[67] If the evidence shows that a record responsive to the access request does exist, the Court can order its disclosure under section 49 of the ATIA. That said, how can the Court access the evidence when it does not have before it the record that is the subject of the refusal to disclose or even any document ancillary to that record? The Federal Court of Appeal has enshrined the following approach to refusal of access based on the non-existence of the requested records, also at paragraph 14 of *Ethyl Canada*:

> However, where documents are alleged by the head of an institution not to exist, the reviewing Court obviously cannot resort

> to its ordinary method of reviewing a refusal decision. Unlike the situation where an exemption from disclosure is claimed, it cannot review the withheld documents to establish whether these documents truly fall within the exempt category. In such a case, we believe it is proper for the applicant or the Commissioner to proceed to file ancillary documents that are relevant to the existence of the requested documents and that can assist the Court in its independent review function of the government's refusal to disclose. In our view, Parliament cannot have intended that the Court would have the relevant evidence to exercise its supervisory function only in the case of refusals based on statutory exemptions, but not in the case of refusals based on non-existence.
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> [Emphasis added.]

[68] When we are dealing with a refusal under paragraph 10(1)(a) of the ATIA, there is no longer any question as to the Court's jurisdiction. The Court always has jurisdiction to hear an application for review arising from a refusal under paragraph 10(1)(a). It then becomes a question of evidence, and in order for the Court to review a refusal decision based on the alleged non-existence of documents, admissible evidence may be produced, including ancillary documents. The judge may then be in a position to conclude that the documents sought do exist and are being withheld. A mere suspicion or belief on the part of the applicant as to the possibility that such documents exist is generally not sufficient, as such suspicions and beliefs must be capable of standing up to scrutiny (*Tomar* at para 46), and a cogent argument is required (*Olumide* at para 19).

VI. Standard of review

[69] In order to determine the appropriate standard of review, the Court must look to the intention of the legislature (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 at para 22). However, the standard of review for

refusing to disclose records based on their non-existence has never been clear (see *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 330 at paras 28 and 29 [*Yeager*]).

[70] This issue was recently discussed by Justice Elliott in *Yeager*. There is no doubt that in such cases, the judge is called upon to make an independent assessment of the evidence (section 44.1 of the ATIA). With respect to the applicable standard of review, Justice Elliott observed that the question of whether an independent assessment of the evidence is equivalent to the correctness standard of review may not be that important, as the result will invariably be the same. She observed:

> [26] In my view, the outcome in this case is the same regardless of the standard of review. This is not the usual case of a refusal to disclose a record based on an exemption under the ATIA . . . .
>
> [27] There is no exemption relied upon here. This is a true "no records" case. Under section 10(1)(a) of the *ATIA*, where a record does not exist, that fact is required to be stated as a ground of refusal in the response provided pursuant to section 7. In keeping with those requirements, the response to Prof. Yeager clearly stated that there were no relevant records. That is, to some extent, a binary question: either the records exist or they do not . . . .
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> . . .
>
> [29] In my view, whether this is considered a correctness review or whether it is an independent assessment of the evidence by this Court, it leads to the same result: the question of whether or not Public Safety controls the records . . . .
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> [Emphasis added.]

[71] It therefore appears to me that since this is a "binary" question with a refusal based on the non-existence of documents, like questions of procedural fairness, even if the standard of review

is “best reflected in the correctness standard’ . . . , strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54). The Court must simply consider whether “the records exist or they do not” (*Yeager* at para 27).

VII. Discussion

[72] Ms. Constantinescu argues that CSC is supposed to be in possession of the documents in question, particularly because a [TRANSLATION] “government institution . . . cannot claim that it does not know when, where and in whose presence a written statement was given by an active employee who is the subject of allegations of assault . . . ”, and because CSC is “supposed to be in possession of the documents that I requested through my access request for a statement given by one of its employees who is the subject of allegations of assault, harassment and intimidation”. She adds that she has made every effort to obtain the information requested in the Access Request and that CSC continues to refuse to provide her with this information.

[73] CSC argues that this is only speculation on the part of Ms. Constantinescu, and that this application for review is simply the latest in a long line of attempts to obtain records that do not exist. It argues that it is clear from CSC’s uncontradicted evidence that it has made every effort to locate any records that are the subject of the Access Request. In short, Ms. Constantinescu has failed to demonstrate, through evidence or ancillary documents, that the records sought exist within the institution or that the search conducted by CSC was incomplete.

[74] Indeed, as appears from the affidavit of the Director of the CSC Access to Information and Privacy Division [the Director's Affidavit] filed in support of its response in this case, CSC conducted an internal investigation (considered reasonable as per the Commissioner's June 21, 2019, Decision), and then a more thorough search of its Québec City Division one year later, following the July 11, 2019, filing of this application for judicial review, to find the requested information.

[75] Mrs. Constantinescu, representing herself before me, did not cross-examine the Director with regard to his affidavit.

[76] At first glance, I must confess that I found CSC's response that there is no record responsive to Ms. Constantinescu's request strange, particularly given the nature of the information she was seeking. We must bear in mind that Ms. Constantinescu was asking for information regarding the circumstances in which the Statement of Mr. Durdu was prepared, a document that is neither dated nor signed, and provided by CSC to Ms. Constantinescu in the context of her case before the CHRT.

[77] Therefore, CSC has control over the Statement of Mr. Durdu, so to argue that it had no other documents in its possession relating to the circumstances in which this document was prepared, without further explanation, is incomprehensible. It does not seem farfetched to me that a party in control of what appears to be an important and relevant internal document should be able to produce information relating to the preparation of that document, absent a reasonable explanation.

[78] As I indicated to the CSC attorney, I am asked to believe that the Statement of Mr. Durdu simply fell out of the sky and magically landed on the desk of the person in charge of this file at CSC.

[79] Contrary to the conclusions of most of the previous decisions of this Court when considering evidence presented to them on an issue involving supposedly non-existent documents, the Director's affidavit did not dispel my concerns.

[80] The Director stated that on June 27, 2018, CSC Human Resources [Human Resources] was identified as the unit responsible for searches in response to Ms. Constantinescu's access request. At some point, Human Resources notified CSC's Access to Information Division that it did not have any records responsive to Ms. Constantinescu's request, and on August 22, 2018, CSC's Access to Information Division informed Ms. Constantinescu that it was apparent from a [TRANSLATION] "thorough search of the files" that CSC did not have any records related to her request.

[81] As previously indicated, the Director's affidavit confirms that on August 20, 2019, one year after CSC's Access Division informed Ms. Constantinescu that it did not possess any records related to her request, and following the filing of this application for review, the Quebec Region was consulted by CSC's Access Division and also confirmed on October 25, 2019, that it did not possess any records responsive to Ms. Constantinescu's access request.

[82] Ms. Constantinescu asserts that the fact that the Quebec Region was consulted after this application for review was filed is evidence that little, if any, actual research was conducted prior to the issuance of the CSC Decision of August 22, 2018. However, I have no evidence before me to seriously suggest that the request for a further document search was not made merely on a precautionary basis given the heightened level of scrutiny engendered by her application for review; there is no reason to assume bad faith on the part of CSC on this ground.

[83] The difficulty I have with the Director's affidavit is that it does not in any way discuss the circumstances of the preparation of the Statement of Mr. Durdu, or even how CSC came into possession of it. The appearance of this document in the hands of CSC remains a mystery. All we know is that the Statement of Mr. Durdu was provided to Ms. Constantinescu by CSC in the context of her case before the CHRT.

[84] It would have been preferable for Ms. Constantinescu to cross-examine the Director, but as an unrepresented litigant, this may not have occurred to her. It should be recalled that Ms. Constantinescu had also made a similar access to information request to the Department of Justice and the response was the same, namely that there were no records responsive to her request.

[85] The recent amendment to section 41 of the ATIA did not resolve the problem raised by the Federal Court of Appeal in *Ethyl Canada*: the Court hearing the application for review can obviously not follow its usual method of reviewing a refusal when there is no record to be examined in reviewing the decision of the government institution.

[86] Ms. Constantinescu is also unable to produce any ancillary documents that are relevant to the existence of the requested records that could assist the Court in exercising its independent review function in respect of the refusal to disclose, as referred to in *Ethyl Canada*. As Ms. Constantinescu has pointed out, CSC controls all the ancillary documents. In *Ethyl Canada,* the OIC had the ancillary records in its possession as they had been provided by the government institution pursuant to section 36(2) of the ATIA, and the OIC was therefore able to introduce them into evidence under section 46 of the ATIA. Given that the OIC has not intervened in this proceeding, it cannot provide the clarification it provided in *Ethyl Canada*.

[87] Without satisfactory evidence, and without any explanation from CSC in this case, I find that Ms. Constantinescu's suspicions that the documents to which she is seeking access do exist and that they may have escaped the attention of CSC in its search clearly do stand up to scrutiny (*Tomar* at para 46). In any event, I find that she has made cogent arguments in the circumstances (*Olumide* at para 19).

[88] The question then becomes how the Court should exercise its function as a reviewing Court when all the ancillary documents are in the hands of the respondent, and its denial of the existence of the document, without further explanation, defies logic.

[89] Parliament has explicitly stated one of the key purposes of the ATIA: independent review of government decisions on disclosure is necessary (paragraph 2(2)(a) ATIA). This explains the clear and broad authority section 46 of the ATIA gives to judges to review all relevant records in

the context of an application for judicial review. As the Federal Court of Appeal observed in *Ethyl Canada* at paragraph 15:

> Where documents that are ancillary to an access request are the only kind of relevant evidence available in a judicial review of a refusal based on non-existence of records, there is no doubt that these documents, if they are not privileged, are admissible if they relate to the issue of existence of the requested documents.

[90] I recognize that *Ethyl Canada* did not involve documents covered by the remedy that the Information Commissioner may exercise under subsection 42(1) of the ATIA. The documents at issue in that case were ones that the Information Commissioner had already obtained in the course of his investigation and that he seeking to file with the Court in support of the main application. Further, I recognize that it was the applicant, the Information Commissioner, who was seeking to introduce the ancillary documents.

[91] However, given the Court's mandate in an application for review, I see no inconsistency with the principle enshrined by the Federal Court of Appeal in *Ethyl Canada*: ancillary documents, if they exist, must be produced by the party holding them, in this case, CSC.

[92] At the September 24, 2020, hearing, I asked counsel for CSC if she could shed light on the circumstances surrounding the Statement of Mr. Durdu, as well as what appeared to be confusion surrounding documents 20 and 28 in the January 8, 2018, email from counsel for CSC to Ms. Constantinescu regarding what information Ms. Constantinescu was looking for.

[93] It appears that counsel for CSC confirmed that documents 20 and 28 are indeed two separate documents. In addition, CSC has stated that the Statement of Mr. Durdu is not dated or

signed, and asserts that a contextual element is found in the reference section of the Statement of Mr. Durdu that appears just below the name “Pierre-Louis Durdu” and reads as follows:

> [TRANSLATION]
> Subject: Convening order / board of inquiry into allegations of inappropriate behavior of a sexual nature and intimidation of another recruit during the CTP-05 course at the Staff College.

[94] In addition, CSC argues that the CSC disclosure list provided to Ms. Constantinescu in her case before the CHRT provides additional context to the Statement of Mr. Durdu, and that Ms. Constantinescu need only consult this list to understand the context in which that statement was prepared. However, I still do not see, in the documents listed in the disclosure list, the elements that would provide the answers that Ms. Constantinescu is seeking through her access request.

[95] According to counsel for CSC, Ms. Constantinescu will have the opportunity to obtain the information she seeks at her hearing before the CHRT. However, what may or may not happen before the CHRT does not in any way inform the Court at this time with respect to its mission to independently review the CSC Decision of August 22, 2018.

[96] Counsel for CSC submit that her client has no information beyond what has already been given to Ms. Constantinescu, and that CSC can only repeat what was communicated in the CSC Decision of August 22, 2018. She adds that the Department of Justice lawyers defending CSC before the CHRT were not involved in the disciplinary board investigation into the late Mr. Durdu but concedes that the Statement of Mr. Durdu was under the control of CSC. In her view, it is possible that there were no other documents responsive to Ms. Constantinescu’s access

request; we can only speculate today about the factual matrix surrounding the creation and use of the Statement of Mr. Durdu, even assuming that the document was in fact prepared by him.

[97] The Court must have evidence to fulfill its role. In this case, I simply did not have that evidence before me.

[98] I therefore adjourned the hearing to October 1, 2020, and issued a direction that CSC serve on Ms. Constantinescu an affidavit of documents, together with the documents identified in Part 1 thereof, containing all ancillary documents relevant to the existence of the records requested by Ms. Constantinescu in her access request, including documents referring to the Statement of Mr. Durdu. A copy of the affidavit of documents, together with the documents listed in Part 1, was to be emailed to the Registry of the Court, without being filed or placed in the Court file.

[99] Issuing a direction that an affidavit of documents be served by CSC on Ms. Constantinescu seemed to me to be the most efficient way to proceed in this case. While such a procedure would normally be reserved for actions under Part 4 of the *Federal Courts Rules*, SOR/98-106 [FCR], rather than applications under Part 5 of the FCR, I see no reason why the Court could not draw on a procedure normally provided for in one part of the FCR and apply the principles of section 3 of the FCR to another part of the FCR. In the end, the Court has the inherent power to apply the FCR in a manner that allows for the just, most expeditious and least expensive determination of the dispute (section 3 FCR; *Hryniak v Mauldin*, [2014] 1 SCR 87; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 84 and 101).

[100] I also directed that the affidavit of documents and the documents identified in it not be filed with the Registry in order to preserve their confidentiality. First of all, affidavits of documents are normally only served and not filed with the Court (subsection 223(1) FCR). Furthermore, since the nature of the documents to be disclosed could not be foreseen, I considered subsection 47(1) of the ATIA, which requires the Court to take precautions against disclosing documents of a certain nature. It was not necessary to issue a confidentiality order (*Blank v Canada (Justice)*, 2007 FCA 101).

[101] On September 30, 2020, the Court received CSC's affidavit of documents [Affidavit of Documents].

[102] In the letter accompanying the Affidavit of Documents, CSC argued that by directing it to identify ancillary documents regarding the existence of the documents requested by Ms. Constantinescu, I was reversing the burden of proof in that it should be up to the applicant, not the respondent, to "file ancillary documents that are relevant to the existence of the requested documents and that can assist the Court in its independent review function of the government's refusal to disclose" (*Ethyl Canada* at para 14)

[103] First, that is not my reading of *Ethyl Canada*. It is clear that in that decision, the Federal Court of Appeal was concerned with the manner in which the powers of this Court to independently review the decisions of a government institution are exercised in the context of an application for judicial review where the government institution "refused to disclose the Discussion Papers on the ground that such documents did not exist".

[104] It was this very concern that prompted me to issue a direction ordering the only party able to produce the ancillary documents to do so.

[105] That said, I am mindful of the observations of the Federal Court of Appeal in *Blank v Canada (Justice)*, 2016 FCA 189 at paragraph 36 [*Blank 2016*]:

> Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith.

[106] In *Blank 2016*, however, the Federal Court of Appeal had the opportunity to review the unredacted version of the documents on which the applicant relied to assert the respondent's bad faith, under the seal of confidentiality, before concluding that the evidence on the record did not provide a reasonable basis to conclude that there was an attempt to tamper with the integrity of the records (*Blank 2016* at paras 34 and 36).

[107] In *Friesen*, Justice Barnes echoed the concerns expressed by the Federal Court of Appeal in *Blank 2016*, observing at paragraph 13:

> Ms. Friesen's concern about the potential existence of further records amounts to speculation which could only be remedied by an order compelling the Department to conduct a further search of its records – an authority this Court does not enjoy: see the Federal Court of Appeal decision in *Blank*, above, at para 36.

[108] However, as was the case in many of the decisions of this Court cited above, the applicant had already received what the government institution claimed to be all the records in its possession in response to her access request. Ms. Friesen was simply not satisfied that all the relevant records had been provided to her, so she filed an application for review. In the end, Justice Barnes was satisfied by the evidence presented to him that the refusal to disclose was not "unlawful".

[109] It seems to me that the case law of this Court teaches that it is essential for the Court to have sufficient evidence to be able to exercise its review role, particularly when the refusal on the basis of non-existence of records defies logic.

[110] As already noted, in the circumstances of this case, I concluded that there were reasonable grounds for further investigation into the existence of ancillary documents relevant to the existence of the requested records that may assist this Court in its review function in respect of the refusal to disclose (*Ethyl Canada* at para 14—which was not the case in *Yeager*, *Olumide* or *Tomar*).

[111] In any event, it seems to me that Ms. Constantinescu has already met her burden by establishing logical and sufficient reasons for the Court to seek the evidence she requires, particularly given the absence of any reasonable explanation by CSC in the circumstances.

[112] That being said, the issue in this case is not truly the burden of proof; rather, it involves allowing the Court to obtain from the parties the evidence that they control and that will allow it

to exercise its independent review function. As I have already noted, I do not see how this is inconsistent with the principle enshrined by the Federal Court of Appeal in *Ethyl Canada* regarding the production of ancillary documents by the party in possession of them.

[113] Furthermore, and contrary to CSC's contention, I did not order CSC to conduct a further search of the records in question. I am mindful that the Federal Court's power under sections 41 and 49 of the ATIA does not include authority to make an order compelling a government institution to conduct a further search for unidentified documents (*Friesen* at para 12). My direction was not aimed at the Statement of Mr. Durdu, but rather at ancillary records that would reasonably have included documents referring to the Statement of Mr. Durdu and that should have already been identified and reviewed by CSC prior to providing Ms. Constantinescu with CSC's Decision of August 22, 2018, assuming of course that the initial inquiry was properly conducted.

[114] Nor, therefore, did the direction have the effect, as CSC argues, of rendering Ms. Constantinescu's application for review moot by granting her the relief she sought, namely, that CSC conduct a new search of its records. Again, the direction was not aimed at the Statement of Mr. Durdu. The CSC can only have it one way: either the ancillary documents allowing CSC to have validly produced the CSC Decision of August 22, 2018, were subject to a [TRANSLATION] "thorough search" or they were not.

[115] As to whether my direction was consistent with one of the purposes of the ATIA, at the time the direction was issued, the Court was not yet in a position to determine that the

government institution “is not authorized to refuse to disclose the record” (section 49 ATIA). Had it ultimately been found that CSC had improperly refused access to information, the Court could have made such other order as it deemed appropriate (section 49 ATIA; see also *Canada (Information Commissioner) v Canada (Minister of External Affairs)*, T-1042-86, T-1090-86, T-1200-86, unreported decision of Justice Muldoon, cited in *Re X* at para 12).

[116] In any event, CSC’s disclosure of ancillary documents allowed the Court to properly appreciate the context of CSC’s Decision of August 22, 2018, by providing an explanation rendering that decision understandable.

[117] The evidence shows that the Statement of Mr. Durdu is held at the Staff College in the written record on the disciplinary investigation into the late Mr. Durdu, in a folder identified as [TRANSLATION] “Documents Filed by P. L. Durdu”. This section contains two documents: the Statement of Mr. Durdu, and a legal opinion provided to the late Mr. Durdu by his lawyer. We now understand that the late Mr. Durdu had retained outside counsel in connection with the investigation into his conduct towards Ms. Constantinescu. This helps to explain why CSC has no documents responsive to Ms. Constantinescu’s access request, and how the Statement of Mr. Durdu, which is included in the written record of the disciplinary investigation, came into the possession of CSC.

[118] The Investigation Report confirms that the late Mr. Durdu arrived at his hearing with his personal notes in hand (identified in the [TRANSLATION] “List of Documents” section of that report) as well as other documents, including a letter from his lawyer. CSC has demonstrated to

this Court that the Statement of Mr. Durdu was in fact the same document as his [TRANSLATION] "personal notes" in the Investigation Report.

[119] The legal opinion addressed to the late Mr. Durdu was not mentioned in Part 1 of the Affidavit of Documents, except in the declaratory portion of it. It is not clear why the legal opinion was disclosed in this manner by CSC, but since a copy of the legal opinion was not provided to Ms. Constantinescu with the documents listed in Part 1 of the Affidavit of Documents, I must assume that she remains free to request access to it. As Mr. Durdu is now deceased, the problems with disclosure due to solicitor-client privilege may be less significant.

[120] With this clarification, the Court can better understand how CSC could reasonably assert that it had no documents in its possession that responded to Ms. Constantinescu's access request.

[121] It may well be that this whole matter could have been avoided had it not been for this alleged lack of attention on the part of counsel for CSC when he responded on January 8, 2018, to the request for information filed by Ms. Constantinescu regarding what was clearly a very important document in her complaint before the CHRT, but again, it is hard to say.

[122] In the end, therefore, Ms. Constantinescu's logical argument can be defeated by the lack of evidence to support her claims; there is no evidence, beyond mere suspicion, that the information sought in the Access Request exists and is in the possession of CSC. Accordingly, this application for judicial review must be dismissed.

VIII. Issues related to my direction

[123] During the October 1, 2020 session, Ms. Constantinescu sought to cross-examine the affiant of the Affidavit of Documents on the basis that the affidavit in question was evasive and misleading. CSC objected to that request. I therefore adjourned the hearing to November 12, 2020, and asked the parties to make written submissions on this issue.

[124] Section 227 of the FCR states:

Sanctions	**Sanctions**
227 On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that	**227** La Cour peut, sur requête, si elle est convaincue qu'un affidavit de documents est inexact ou insuffisant, examiner tout document susceptible d'être pertinent et ordonner :
(a) the deponent of the affidavit be cross-examined;	a) que l'auteur de l'affidavit soit contre-interrogé;
(b) an accurate or complete affidavit be served and filed;	b) qu'un affidavit exact ou complet soit signifié et déposé;
(c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or	c) que les actes de procédure de la partie pour le compte de laquelle l'affidavit a été établi soient radiés en totalité ou en partie;
(d) that the party on behalf of whom the affidavit was made pay costs.	d) que la partie pour le compte de laquelle l'affidavit a été établi paie les dépens.

[125] The onus is on Ms. Constantinescu to provide the Court with persuasive evidence that existing documents were not listed in the Affidavit of Documents (*Pharmascience inc. v*

Glaxosmithkline inc., 2007 FC 1261 at paras 17 to 19). Ms. Constantinescu has not persuaded me of this, and I cannot conclude that the Affidavit of Documents is inaccurate or insufficient.

[126] In seeking examine the affiant of the Affidavit of Documents, Ms. Constantinescu is also attempting to learn more about the documents produced during the investigation of the late Mr. Durdu, including the Investigation Report, in particular whether they were in fact all gathered together in a binder and given to the affiant of the Affidavit of Documents.

[127] At this point, I find that Ms. Constantinescu's intent is beyond the scope of this application for review. There is no doubt that the affiant consulted the documents in question in order to prepare the Affidavit of Documents. Further, and more importantly, the purpose of directing CSC to serve an Affidavit of Documents was to allow the Court to better appreciate the context surrounding its refusal to disclose documents; it was not to give Ms. Constantinescu more leverage to pursue avenues of inquiry in the proceedings before the CHRT.

[128] In this case, I am of the view that the Court now has the necessary evidence to rule on this application for review, and while Ms. Constantinescu continues to speculate as to whether the personal notes referred to in the Investigation Report are in fact Document 20, the Statement of Mr. Durdu, that inquiry should be conducted at the hearing before the CHRT. At this time, I am not persuaded that allowing Ms. Constantinescu to cross-examine the affiant of the Affidavit of Documents will shed any further light on this issue.

[129] Ms. Constantinescu also asked whether the documents listed in Part 2 of the Affidavit of Documents to which a claim of solicitor-client privilege is alleged to attach are properly excluded from disclosure. I have reviewed the documents and find that they are. They should not be disclosed to Ms. Constantinescu (*Blank v Canada (Minister of the Environment)*, 2001 FCA 374 at para 17).

IX. Conclusion

[130] The Court has an obligation, where appropriate, to give some latitude to self-represented litigants, who often have not had the benefit of legal advice, so that they understand that they were entitled to a fair hearing. Ms. Constantinescu has come a long way in this case, and given that the circumstances surrounding the Statement of Mr. Durdu were apparently the source of great distress for her, I hope that she will now be able to turn the page.

[131] Ms. Constantinescu was constantly informed, including by the CHRT, that she would have the opportunity to obtain information regarding the circumstances surrounding the preparation of the Statement of Mr. Durdu when she cross-examined Mr. Durdu at the hearing before the CHRT. Mr. Durdu has since passed away, and Ms. Constantinescu therefore turned to me.

[132] I sympathize with Ms. Constantinescu to the extent that things have changed with respect to the Statement of Mr. Durdu in light of his death. I can only repeat what the CHRT had previously pointed out to her, that it “is important to understand that the disclosure of documents process is different from the admissibility of evidence process at the Tribunal hearing . . . ”.

Procedural solutions may be available to Ms. Constantinescu when the Statement of Mr. Durdu is introduced into evidence in the context of her complaint to the CHRT.

[133] For the above reasons, I dismiss this application for judicial review.

X. Costs

[134] Finally, CSC relies on section 53 of the ATIA to request that Ms. Constantinescu be ordered to pay costs. It describes her application as frivolous, vexatious and abusive and argues that it does not raise any important new principles. An example of the abusive nature of the application would be Ms. Constantinescu's persistence after Prothonotary Steele indicated to her in her November 7, 2019, order that her evidence might be insufficient, particularly after the respondent conducted further research to find the information following the filing of the application for review.

[135] CSC adds that Ms. Constantinescu has only sullied the reputation of numerous individuals within CSC and the Office of the Commissioner with spurious allegations of abuse and falsification and destruction of documents in her single-minded pursuit of documents that do not exist. Therefore, the only way to put an end to Ms. Constantinescu's ongoing abusive behaviour would be to order her to pay costs in the amount of $2,000.

[136] For her part, Ms. Constantinescu remains convinced that every allegation and assertion she has made is supported by evidence. She insists that the information she was seeking could very easily have been gathered by CSC from Mr. Durdu before his death. When I reminded her

that the obligation of government institutions under the ATIA was to disclose documents, not to gather information or explain the documents that have been disclosed, she pointed out that it was only in the course of this application for review that she first understood CSC's position that the document described as Mr. Durdu's personal notes in the Investigation Report is the same document as the Statement of Mr. Durdu.

[137] As previously noted, I am satisfied that the outcome of this proceeding now allows Ms. Constantinescu to accept the CSC decision of August 22, 2018, as correct. This proceeding will therefore not have been in vain.

[138] I have examined section 53 of the ATIA, in particular subsection 53(2). Although not initially obvious, this case has raised an important issue that, in my view, has not been fully addressed by this Court in the past. For that reason, I would have been inclined to award costs in favour of Ms. Constantinescu, regardless of the fact that her application was dismissed. However, I cannot agree with the manner in which Ms. Constantinescu has consistently, both in her written submissions and orally before me, made accusations of impropriety, deceit and bad faith against those involved in processing her access request. I must consider her conduct throughout the proceedings with respect to the awarding of costs.

[139] On balance, there is no basis for awarding costs. While I understand that Ms. Constantinescu feels cheated by the applicant, this does not justify her personal attacks. Ms. Constantinescu could have better served her cause by focusing on the real issues rather than fanning the flames with caustic language, regardless of her feelings. As I have noted, I hope that

Ms. Constantinescu now understands that CSC does not have any documents responsive to her access request, and that she will likely have the opportunity, in the course of pursuing her complaint before the CHRT, to obtain any relevant information from CSC at the appropriate time. My decision with respect to costs is strictly a reflection of the record before me and should in no way prejudice how another judge may rule on costs should the issues relating to this application for judicial review be raised and discussed at a later date.

JUDGMENT in T-1125-19

THIS COURT'S JUDGMENT is as follows:

1. The respondent in the style of cause is hereby amended to the Correctional Service of Canada.

2. The application for judicial review is dismissed.

3. Without costs.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles, Reviser

Appendix A

Before Bill C-58

Purpose	**Objet**
2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	2(1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.
Complementary procedures	**Étoffement des modalités d'accès**
(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.	(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.
Where access is refused	**Refus de communication**
10(1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a):	10(1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande

de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

(a) that the record does not exist, or

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

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

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

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

Existence of a record not required to be disclosed

Dispense de divulgation de l'existence d'un document

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

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

Deemed refusal to give access

Présomption de refus

(3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

(3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente loi vaut décision de refus de communication.

. . .

Review by Federal Court

41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

. . .

Access to records

46 Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

. . .

. . .

Révision par la Cour fédérale

41 La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

. . .

Accès aux documents

46 Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, la Cour a, pour les recours prévus aux articles 41, 42 et 44, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

. . .

Access to records

Burden of proof

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

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.

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Costs

Accès aux documents

Charge de la preuve

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

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.

. . .

Frais et dépens

53(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

53(1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

Appendix B

Amendment after Bill C-58

Purpose of Act	**Objet de la loi**
2(1) The purpose of this 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.	2(1) La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.
Specific purposes of Parts 1 and 2	**Objets spécifiques : parties 1 et 2**
(2) In furtherance of that purpose,	(2) À cet égard :
(a) Part 1 extends the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government; and	a) la partie 1 élargit l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif;
(b) Part 2 sets out requirements for the proactive publication of information.	b) la partie 2 fixe des exigences visant la publication proactive de renseignements.
. . .	. . .
Where access is refused	**Refus de communication**

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

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

(a) that the record does not exist, or

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

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

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

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

Existence of a record not required to be disclosed

Dispense de divulgation de l’existence d’un document

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

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

Deemed refusal to give access

Présomption de refus

(3) Where the head of a government institution fails to give access to a record

(3) Le défaut de communication totale ou partielle d’un document dans

requested under this Part or a part thereof within the time limits set out in this Part, the head of the institution shall, for the purposes of this Part, be deemed to have refused to give access.

les délais prévus par la présente partie vaut décision de refus de communication.

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Receipt and investigation of complaints

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

Réception des plaintes et enquêtes

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

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

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

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

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

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

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

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

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

a period of time that they consider appropriate;

(d.1) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

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

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

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

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

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

Review by Federal Court – complainant

41(1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.

Révision par la Cour fédérale: plaignant

41(1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

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***De novo* review**

44.1 For greater certainty, an application under section 41 or 44 is to be heard and

Révision *de novo*

44.1 Il est entendu que les recours prévus aux articles 41

determined as a new proceeding.

. . .

Access to records

46 Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, the Court may, in the course of any proceedings before it arising from an application under section 41 or 44, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

. . .

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.

et 44 sont entendus et jugés comme une nouvelle affaire.

. . .

Accès aux documents

46 Malgré toute autre loi fédérale, toute immunité reconnue par le droit de la preuve, le secret professionnel de l'avocat ou du notaire et le privilège relatif au litige, la Cour a, pour les recours prévus aux articles 41 et 44, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente partie s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

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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 if authorization to refuse disclosure found

50.1 The Court shall, if it determines that the head of a government institution is authorized to refuse to disclose a record or a part of a record on the basis of a provision of this Part not referred to in section 50 or that the head of the institution has reasonable grounds on which to refuse to disclose a record or a part of a record on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to the matter that is the subject of the proceedings, or shall make any other order that it considers appropriate.

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

50.1 La Cour, dans les cas où elle conclut au bon droit du responsable de l'institution fédérale de refuser la communication totale ou partielle d'un document au titre de dispositions de la présente partie autres que celles mentionnées à l'article 50 ou que le refus du responsable de l'institution fédérale est fondé sur des motifs raisonnables lorsque le refus s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), rend une ordonnance où elle déclare que le responsable de l'institution fédérale n'est pas tenu de respecter les dispositions de l'ordonnance du Commissaire à l'information qui traitent des questions qui font l'objet du recours ou rend toute autre ordonnance qu'elle estime indiquée.

Order of Court – other decisions or actions

50.2 If the subject matter of the proceedings before the Court is the decision or action of the head of a government institution, other than a decision or action referred to in any of sections 49 to 50.1, the Court shall,

(a) if it determines that the head of the institution is not authorized to make that

Ordonnance de la Cour : autres décisions ou actions

50.2 Dans les cas où les questions qui font l'objet du recours portent sur des décisions ou des actions du responsable de l'institution fédérale autres que celles visées à l'un des articles 49 à 50.1, la Cour :

a) si elle conclut que les décisions ou actions n'étaient pas autorisées, rend une

decision or to take that action, make an order declaring that the head of the institution is required to comply with the provisions of the Information Commissioner's order that relate to that matter, or make any other order that it considers appropriate; or

ordonnance où elle déclare que le responsable de l'institution fédérale est tenu de respecter les dispositions de l'ordonnance du Commissaire à l'information qui traitent de ces questions ou rend toute autre ordonnance qu'elle estime indiquée;

(b) if it determines that the head of the institution is authorized to make that decision or to take that action, make an order declaring that the head of the institution is not required to comply with the provisions of the Information Commissioner's order that relate to that matter, or make any other order that it considers appropriate.

b) si elle conclut au bien-fondé des décisions ou actions, rend une ordonnance où elle déclare que le responsable de l'institution fédérale n'est pas tenu de respecter les dispositions de l'ordonnance du Commissaire à l'information qui traitent de ces questions ou rend toute autre ordonnance qu'elle estime indiquée.

. . .

. . .

Costs

53(1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Part shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Frais et dépens

53(1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Costs – important new principle

(2) If the Court is of the opinion that an application for review under section 41 has raised an important new principle in relation to this Part, the Court shall order that costs be awarded to the applicant even if the applicant

Principe important et nouveau

(2) Dans les cas où elle estime que l'objet des recours prévus à l'article 41 a soulevé un principe important et nouveau quant à la présente partie, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle,

has not been successful in the result.	même si cette personne a été déboutée de son recours.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1125-19
STYLE OF CAUSE:	CECILIA CONSTANTINESCU v. CORRECTIONAL SERVICE OF CANADA
PLACE OF HEARING:	MATTER HEARD BY VIDEOCONFERENCE IN MONTRÉAL, QUEBEC
DATES OF HEARING:	SEPTEMBER 24, OCTOBER 1 AND NOVEMBER 12, 2020
JUDGMENT AND REASONS :	PAMEL J.
DATED:	MARCH 16, 2021

APPEARANCES:

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Marilou Bordeleau	FOR THE RESPONDENT

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