

Federal Court



Cour fédérale

Date: 20210823

Docket: T-774-20

Citation: 2021 FC 858

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 23, 2021

PRESENT: The Honourable Madam Associate Chief Justice Gagné

BETWEEN:

RÉGIS BENIEY

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] In the context of an application for review brought pursuant to section 41 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA], I have two motions before me: (i) a motion for leave to appeal a decision by Prothonotary Alexandra Steele, in which she authorizes [TRANSLATION] “the respondent to file under confidential seal an affidavit containing, among other things, unredacted copies of the records at issue that are the subject of the application for judicial review in this case, which the respondent refuses to disclose pursuant to subsection 19(1) of the ATIA”;

and (ii) a motion from the respondent to strike the application, without possibility of amendment, in particular because the application is moot given that no records exist regarding which the Royal Canadian Mounted Police [RCMP] would have invoked exemptions under subsection 19(1) of the ATIA.

[2] On the face of the record, there is a glaring contradiction in the position adopted by the respondent, who is asking that non-existent records be filed under confidential seal. However, upon closer examination, it appears that this contradiction is instead the result of a misunderstanding between the parties that arose when the access to information request of the applicant (who is self-represented) was being reviewed by the RCMP.

I. History of the access request

[3] To clarify the confusion at the heart of the motions of which I am seized, I will need to provide a timeline of the facts.

[4] It all began when, on October 22, 2018, Régis Beniey presented the following access to information request to the RCMP (which would later be given the number A-2018-08639):

[TRANSLATION]

Any personal information about me held by the RCMP (as a whole without restriction to a single branch). Not only information of which I am the author. By personal information I mean the information defined by the ACT in the definitions section: (<https://laws-lois.justice.gc.ca/eng/acts/p-21/page-1.html#h-3>). ALSO include all transcripts identifying me or referring to me, my work, my state, my circumstances in the context of the proceedings in R vs TAYLOR (Veron Alwyn Taylor). ALSO include all information located in the following places: Hamilton Niagara

Regional Detachment/Serious and Organized Crime/RCMP
Hamilton-Niagara/Intake & Response Team.

[5] On November 27, 2018, having received no response to his request within the 30-day time limit set out in the ATIA, Mr. Beniey filed an initial complaint with the Office of the Information Commissioner of Canada [OIC] (File No. 3218-01370) for a deemed refusal under subsection 10(3) of the ATIA.

[6] The record contains no information about how this first complaint was handled, but on May 30, 2019, Yvonne Robinson sent Mr. Beniey the following email:

Good afternoon Regis,

I am a consultant that has been hired by the RCMP ATIP unit to help them catch up processing old requests for information. I have been assigned your file, requesting:

[TRANSLATION] “Any personal information about me held by the RCMP (as a whole without restriction to a single branch). Not only information of which I am the author. By personal information I mean the information defined by the ACT in the definitions section: (<https://laws-lois.justice.gc.ca/eng/acts/p-21/page-1.html#h-3>). ALSO include all transcripts identifying me or referring to me, my work, my state, my circumstances in the context of the proceedings in R vs TAYLOR (Veron Alwyn Taylor).”

I have looked through the pages that have been provided, related to this request and I have not found any PERSONAL information related to you. I have noted your role at the border crossing, resulting in the arrest of Veron Taylor but none of what I have read would be your personal information. I have not noted any records that discuss your role, offering any comments on performance or anything that would be considered to be yours personally. I do have the occurrence details report but you would not be eligible to receive this under either the Access to information Act or the Privacy Act as much of the document would be the personal information of Veron Taylor.

I can certainly process the request and exempt all of the information but I was wondering if there is something in particular that you are searching for, rather than ATIP declining access to the records under the ATIP legislation.

Please let me know how you would like me to proceed,

Yvonne Robinson

[7] The following day, Mr. Beniey sent the following reply:

[TRANSLATION]

Thank you for your email. Would it be possible to receive a copy of all subpoenas mentioning me and/or bearing my signature. In particular the one referred to by the Crown in the email attached to this one (see attached document).

Thank you.

[8] Further exchanges followed between them:

[TRANSLATION]

Ms. Robinson:

Thank you for the clarification.

Is this an order to appear for you? Because an order to appear issued to somebody else (even if it is signed by you) belongs to the person subpoenaed.

Yvonne

Mr. Beniey:

Yes, all orders to appear for me.

Thank you.

Ms. Robinson:

Good news!

I have received one, dated December 22, 2016.

Should I be looking for more or is this what you are looking for?

Yvonne

Mr. Beniey:

Thank you. You may send it to me.

Have a good day.

[9] On June 7, 2019, the RCMP's access to information officer officially replied to access to information request number A-2018-08639, repeated verbatim the wording of the request and concluded as follows:

[TRANSLATION]

Based on the information provided, we have conducted a file search in Division O. Please find attached a copy of all the information to which you are entitled. Please note that some information is subject to an exemption under subsection 19(1) of the Act, a description of which can be found here: <https://laws-lois.justice.gc.ca/eng/acts/p-21>.

[10] Only two redacted records of one page each were attached: a summons to appear before the Ontario Superior Court of Justice addressed to Mr. Beniey and the affidavit indicating that this summons had been served on Mr. Beniey. The names of the accused and the commissioner for taking affidavits as well as the charge(s) were redacted.

[11] On July 18, 2019, the OIC issued a report in file number 3218-01370 (file number given to the deemed refusal complaint of December 4, 2018). Again, this report reproduces the wording of Mr. Beniey's access request and concludes as follows:

[TRANSLATION]

At the start of our investigation, we determined that the RCMP responded to your request on June 3, 2019. Accordingly, this investigation is closed, and we consider your complaint resolved.

[12] On July 25, 2019, the OIC gave the RCMP notice of a new refusal complaint received from Mr. Beniey (File No. 3219-00858) with respect to request number A-2018-08639. The OIC requires a certain amount of information and records to launch its investigation, namely, records meeting the request, the reasons for applying the exemptions and the names of resource persons.

[13] On May 26, 2020 (according to the affidavit of Ray Duguay, as the document is not dated), the RCMP's access to information officer again replied to Mr. Beniey's access request and specified that, following the complaint filed with the OIC (File No. 3219-00858), Mr. Beniey was being provided with [TRANSLATION] "additional information". Attached to that letter were the same two records disclosed to Mr. Beniey on June 7, 2019, but in which all the information appeared.

[14] In the days that followed, Mr. Beniey had the following email exchanges with Christian Picard, Director of Investigations at the OIC:

[TRANSLATION]

Mr. Picard

Dear Mr. Beniey,

Following our intervention, the RCMP has sent you unredacted versions of all of the requested records.

Your comments or submissions regarding this matter would be greatly appreciated.

Cordially,

Christian Picard

Mr. Beniey

Mr. Picard, what do you mean?

Is it your view that these three pages are everything I requested?

Mr. Picard

Hello,

Yes, as this complaint related only to the exemptions invoked. It was not a missing records complaint.

Christian

[15] On June 8, 2020, the OIC delivered its official investigation report (File No. 3219-00858) and concluded that because the complaint applied only to the redacted records that had been disclosed and the exemption based on subsection 19(1) of the ATIA, and because the records had been disclosed in full by the RCMP, the complaint was resolved. It closed by mentioning that if Mr. Beniey were unsatisfied, he could avail himself of his right to apply for judicial review under section 41 of the ATIA, which he did by filing this application on July 17, 2020, within the prescribed timeframes.

[16] On July 20, 2020, without Mr. Beniey's knowledge, the OIC sent the RCMP a new Notice of Intention to Investigate and the substance of the complaint (File No. 5820-01015), but still regarding Mr. Beniey's access request number A-2018-08639. This notice stated the following:

[TRANSLATION]

The Information Commissioner received a complaint to the effect that the Royal Canadian Mounted Police has not conducted a

reasonable search for the records identified in a request presented under the *Access to Information Act*.

[17] This, in my view, is where the problem lies.

[18] The RCMP indeed conducted a search of its files and gathered in the records and information likely to be covered by Mr. Beniey's access request, as worded. However, the RCMP had understood from the email exchange between Mr. Beniey and Ms. Robinson in June 2019 that Mr. Beniey was considerably reducing the scope of his request and wished only to receive notices to appear addressed to himself. And, before the Federal Court of Appeal rendered its decision in *Canada (Public Safety and Emergency Preparedness) v Gregory*, 2021 FCA 33 [*Gregory*] (I will return to this below), the RCMP applied for an order authorizing it to file with the Court, under confidential seal, the records and information that, in its view, were covered by Mr. Beniey's access request. However, now relying on *Gregory*, it has decided instead to file the motion to dismiss that is now before me, for prematurity and lack of jurisdiction.

II. Issues

[19] These motions therefore raise the following issues:

- A. *What is the true purpose of the application for judicial review?*
- B. *Should the motion to dismiss be granted?*
- C. *If not, should the motion for leave to appeal Prothonotary Steele's decision be granted?*

III. Analysis

A. *To which decision does this application for judicial review apply?*

[20] It appears evident from the sequence of events presented above that this application for judicial review applies to the OIC's decision concluding that the RCMP responded adequately to the access request in disclosing the two unredacted records, namely, the decision regarding the exemption set out at subsection 19(1) of the ATIA. It appears equally evident that the records covered by Prothonotary Steele's confidentiality order are those connected with the second notice of complaint sent by the OIC, which has not yet reached the decision stage at the OIC—the complaint about the RCMP's failure to conduct a reasonable file search.

[21] Although the applicant's access request had a much larger scope than that initially handled by the RCMP, it is easy to see that this outcome resulted from a good-faith error committed by both the RCMP and the OIC. In the email exchange between Mr. Beniey and Ms. Robinson, representing the RCMP, the former implied that he would be satisfied with his order to appear and the affidavit of service of that order to appear. His reaction to his subsequent email exchange with Mr. Picard, representing the OIC, shows that this was not the case at all. It was probably from this email exchange that Mr. Picard realized that he too had been mistaken about the scope of the access to information request, hence the second notice of complaint.

B. *Should the motion to dismiss be granted?*

[22] In its recent decision in *Gregory*, the Federal Court of Appeal was called upon to rule on a motion to dismiss similar to this one. Faced with the RCMP's failure to follow up on his access to information request within the prescribed timeframes, Mr. Gregory filed a complaint with the OIC, which held that it was well founded. Mr. Gregory filed an application for judicial review of this decision by the OIC, before the RCMP had responded to his access request. Although the RCMP subsequently responded to the access request, invoking one of the exemptions set out in the ATIA to refuse disclosure, the Federal Court of Appeal allowed the appeal and dismissed the application for judicial review for prematurity. The Court reiterates that an applicant must have received the OIC's report as a precondition for exercising their right to seek leave to appeal under section 41 of the ATIA.

[23] In this case, the only report issued by the OIC was that of June 8, 2020, in which it concluded that the complaint regarding the exemption in subsection 19(1) of the ATIA had been resolved to Mr. Beniey's satisfaction because, following its intervention, the RCMP had provided him with unredacted copies of the records requested.

[24] If Mr. Beniey is seeking judicial review of this decision, his application is moot.

[25] Also, if his application for judicial review involves the complaint regarding the RCMP's failure to make reasonable efforts to find the records, the application is premature because the OIC has yet to issue its report following the notice of complaint delivered to the RCMP on July 20, 2020 (File No. 5820-01015).

[26] While this outcome may be very disappointing for Mr. Beniey, especially in light of how much time has passed since he submitted his access to information request, neither the concern for judicial economy nor any other relevant factor warrants this Court's hearing a proceeding despite its mootness and/or prematurity or warrants the continuation of this application for judicial review.

[27] Mr. Beniey is not without remedy, as the OIC will review the records gathered by the RCMP following the complaint of July 20, 2020, and it will report accordingly.

[28] Given what precedes, I need not address the third issue raised by this application. The motion for leave to appeal Prothonotary Steele's decision is therefore moot and must be dismissed.

IV. Conclusion

[29] For the reasons set out above, the respondent's motion to dismiss will be granted and the motion for leave to appeal Prothonotary Steele's decision will be dismissed. I will, however, exercise my discretion not to award any costs.

JUDGMENT in T-774-20

THIS COURT'S JUDGMENT is as follows:

1. The respondent's motion to strike the applicant's notice of application is granted;
2. The applicant's application for judicial review is dismissed, without possibility of amendment;
3. The motion for leave to appeal a decision rendered by Prothonotary Alexandra Steele on April 23, 2021, and corrected on April 26, 2021, is dismissed; and
4. No costs are awarded.

"Jocelyne Gagné"

Judge

Certified true translation
Johanna Kratz

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-774-20

STYLE OF CAUSE: RÉGIS BENIEY v MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

DATE OF HEARING: JUNE 4, 2021

JUDGMENT AND REASONS: GAGNÉ A.C.J.

DATED: AUGUST 23, 2021

APPEARANCES:

Régis Beniey FOR THE APPLICANT

Marilou Bordeleau FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada FOR THE RESPONDENT
Ottawa, Ontario