

Federal Court



Cour fédérale

Date: 20220719

Docket: T-655-21

Citation: 2022 FC 1068

Ottawa, Ontario, July 19, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

RONALD HENDRIKX

Applicant

and

MINISTER OF PUBLIC SAFETY

Respondent

JUDGMENT AND REASONS

[1] This is an application commenced under section 41 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA]. The Applicant, who is self-represented, seeks judicial review of a Final Report prepared by the Office of the Information Commissioner of Canada [OIC] dated March 16, 2021, wherein the OIC found that the Applicant's complaint was not well founded. In his complaint to the OIC, the Applicant alleged that the Canada Border Services Agency [CBSA] did not conduct a reasonable search under the ATIA when responding to his access request seeking a video record of a secondary search which he was subjected to at the Vancouver International Airport on August

1, 2020. Both the CBSA and OIC reports came to the conclusion that the requested video had been overwritten by the CBSA prior to the access to information and privacy [ATIP] request being made by the Applicant and therefore no longer exists. In his Notice of Application, the Applicant seeks an order for the release of the video. However, in his memorandum of fact and law, the Applicant seeks different relief – namely, (a) a finding that his complaint to the OIC was well founded; (b) a finding that violations of subsection 67.1(1) of the *ATIA* occurred; (c) a referral of this matter directly to the Attorney General of Canada; and (d) any additional orders or remedies that are deemed appropriate.

[2] For the reasons that follow, the application shall be dismissed in its entirety.

I. Background

[3] On August 5, 2020, the Applicant filed a complaint regarding the loss of his wallet following a secondary search by the CBSA at the Vancouver International Airport and requested the release of the surveillance video of the search conducted on August 1, 2020.

[4] On August 29 and September 4, 2020, the Applicant spoke with CBSA Superintendent Dhillon in charge of investigating his complaint, who instructed the Applicant to make an ATIP request to obtain release of the video.

[5] On October 7, 2020, the Applicant received an undated complaint response from the Chief of Operations for the Pacific Region. The letter stated, in part, as follows:

... I can assure you that this matter was investigated in an effort to determine if the missing wallet was examined and/or could have been misplaced during your time in secondary. I understand that Superintendent Dhillon spoke with you concerning this matter. I regret to inform you that unfortunately in this case, we were unable to ascertain from the video footage if a large black wallet was indeed ever present during the exam. Additionally, the BSO who examined your goods states he did not examine any such wallet and that you were asked to repack all of your belongings yourself. Moreover, he and other officers made every attempt to try to locate the wallet within the examination era after your concerns were brought to their attention.

After completing the review, senior officials concluded that the officers involved in your examination followed established procedures and guidelines. However, I regret that there has been no resolution in determining the whereabouts of your missing item...

I note your request for the video footage for the secondary examination and understand that Superintendent Dhillon previously provided you with the information on how to make a request for personal information held by the CBSA.... To make an Access to Information request, please refer to the Government of Canada Website at the following link...

[6] On October 26, 2020, the Applicant made an ATIP request for the “complete video surveillance records of a search conducted on August 1, 2020 at Vancouver International Airport”.

[7] On November 9, 2020, the CBSA advised the Applicant that the video “does not exist”.

The letter further advised that:

A search for your video has been conducted, unfortunately the video you are looking for was not found. Our video footage are continuously being overwritten after 30 to 60 days depending on the point of entry.

[8] On November 16, 2020, the Applicant initiated a complaint with the OIC regarding the CBSA’s response to his ATIP request. In his complaint, the Applicant alleged that the CBSA had

failed to conduct a reasonable search for records responsive to his request. In a final report dated March 16, 2021, the OIC determined that the CBSA tasked the most appropriate program area with the request, and conducted the search within the relevant information holding. The OIC noted that the requested video could not be located and was overwritten by CBSA prior to the access request being made by the Applicant. The OIC noted that it had confirmed that this overwriting of the video was done in accordance with CBSA's retention policy. The OIC was satisfied that the CBSA had conducted a reasonable search for records and accordingly, found that the Applicant's complaint was not well founded.

[9] On April 16, 2021, the Applicant commenced this application under section 41 of the *ATIA*. Shortly after being served with a copy of the Notice of Application, the Attorney General of Canada advised the Applicant that the Minister of Public Safety was the appropriate respondent, rather than the OIC. As the parties were unable to reach an agreement on this issue, the Minister of Public Safety asserted his right to appear as a party to the application pursuant to subsection 41.2(1) of the *ATIA* and served and filed a notice of appearance.

II. Preliminary Issue

[10] As a preliminary issue and as noted above, the Respondent asserts that the Minister of Public Safety, and not the OIC, is the proper respondent in this application. The Applicant continues to assert that the OIC is the proper respondent, particularly given the relief sought by the Applicant under subsection 67.1(1) of the *ATIA*, although no authority was cited by the Applicant in support of his position.

[11] Subsection 41(5) of the *ATIA* provides:

Respondents

(5) The person who applies for a review under subsection (1), (3) or (4) may name only the head of the government institution concerned as the respondent to the proceedings. The head of the government institution who applies for a review under subsection (2) may name only the Information Commissioner as the respondent to the proceedings.

Défendeur

(5) La personne qui exerce un recours au titre des paragraphes (1), (3) ou (4) ne peut désigner, à titre de défendeur, que le responsable de l'institution fédérale concernée; le responsable d'une institution fédérale qui exerce un recours au titre du paragraphe (2) ne peut désigner, à titre de défendeur, que le Commissaire à l'information.

[12] Accordingly, pursuant to subsection 41(5) of the *ATIA*, only the head of the government institution concerned (in this case, the Minister of Public Safety) may be named as a respondent.

[13] The fact that the OIC is not the proper respondent stems from the nature of a section 41 application. A section 41 application does not provide for recourse in relation to the investigation conducted by the OIC, nor does the Court engage in a review of any recommendations made by the OIC. Rather, the Court's focus is on the decision of the government institution to refuse access to records [see *Canada (Attorney General) v Bellemare*, [2000] FCJ No 2077 at paras 11-13].

[14] Accordingly, the style of cause shall be amended with immediate effect to name the Minister of Public Safety as the sole respondent in this proceeding.

III. Remaining Issue

[15] In his Notice of Application and memorandum of fact and law, the Applicant seeks relief in relation to the investigation and recommendations of the OIC, although no express list of issues

for the Court's determination have been articulated by the Applicant. However, as noted above, the Court has no jurisdiction, pursuant to section 41 of the *ATIA*, to conduct a judicial review of the OIC's findings and recommendations [see *Bellemare, supra* at para 13].

[16] The Respondent asserts that the issues for determination on this application are: (a) whether the CBSA was authorized to refuse disclosure of the record requested as it does not exist; and (b) whether the Court can grant the remedies requested in the Applicant's memorandum.

[17] Having considered the submissions of the parties, I am satisfied that the sole issue for determination is whether there are grounds to grant the various forms of relief sought by the Applicant.

[18] In considering the issue raised on this application, I note that section 44.1 of the *ATIA* provides that an application under section 41 is to be "heard and determined as a new proceeding". Therefore, the general presumption that review will be conducted on the standard of review of reasonableness does not apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 32-35; *Kimery v Canada (Justice)*, 2022 FC 829 at para 17]. This is not a case where the Minister exercised a discretion under the *ATIA* and was therefore entitled to deference through review on the reasonableness standard [see *Lambert v Canada (Canadian Heritage)*, 2022 FC 553 at para 7; *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para 31].

IV. Analysis

[19] In considering the relief requested by the Applicant, it is critical to keep in mind the role played by the Court on a section 41 application. As stated by the Federal Court of Appeal in *Blank v Canada (Minister of Justice)*, 2016 FCA 189 at para 36:

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. On the basis of the confidential record that is before me, I have been unable to find evidence that would lead me to believe, on reasonable grounds, that there has been any attempt to tamper with the integrity of the records...

[20] Subsection 10(1)(a) of the *ATIA* provides that a government institution is authorized to refuse to disclose a record if the record does not exist. In support of its assertion that the video no longer exists, the Respondent filed the affidavit of Béatrice Lanoix sworn January 18, 2022. Ms. Lanoix is the Acting Assistant Director in the ATIP division of the Strategic Policy Branch of the CBSA. Her evidence was, in part, as follows:

3. On October 26, 2022, the CBSA received an access to information request from the Applicant (A-2020-16673). He requested complete video surveillance records of a search conducted on him on August 1, 2020 at the Vancouver International Airport. A copy of this request received by the CBSA is attached hereto as Exhibit A.

4. In response to the request, on October 29, 2020, the CBSA ATIP division reached out to the ATIP Liaison Officer in the Pacific Region to action the request. The CBSA's ATIP division tasked the search for the video surveillance record to the Pacific Region as that is where the Vancouver International Airport is located geographically. In turn, the Pacific Region ATIP requested that the Vancouver International Airport complete a search for the record.

The surveillance footage for the airport is stored on site. Accordingly, this was the appropriate division to conduct the search.

5. On November 5, 2020, Pacific Region ATIP responded to the CBSA's ATIP division indicating that no responsive records were found. A search was conducted but due to the passage of time, the footage from that date had been overwritten. There are no backups or archives of video footage. A copy of the email from the ATIP Liaison Officer in the Pacific Region communicating the "nil" response with supporting documentation is attached hereto as Exhibit B.

...

9. CBSA's Policy on the *Overt Use of Audio-Video Monitoring and Recording Technology* [Audio-Video Policy] provides that audio-video monitoring activity must be retained for at least thirty days. In accordance with this policy, the CBSA's surveillance footage is automatically overwritten every 30 to 60 days, depending on the location. A copy of this policy is attached hereto as Exhibit E.

10. In preparing this affidavit, I have liaised with the Pacific Region and reviewed the relevant documentation on file. My review of the file reveals that the tape was overwritten without any copies having been made due to administrative inadvertence.

11. On August 5, 2020, the Applicant filed a traveller's complaint regarding a missing wallet following a secondary inspection by the CBSA on August 1, 2021 at the Vancouver International Airport. On August 6, 2020, Superintendent Sanjit Dhillon, who works at the Vancouver International Airport, was assigned to look into the Applicant's complaint. However, Superintendent Gurpreet Hara, who was on duty that day and is experienced in the use of surveillance software, was directed to pull the footage in question. I have spoken to Superintendent Hara, who indicated that he located the video in question and watched it for the purpose of responding to the complaint. He did not save the video in question. Superintendent Hara informed me that he indicated the time stamps of the search in question to Superintendent Dhillon and thought Superintendent Dhillon would save the footage.

12. Superintendent Dhillon then had to go on unexpected leave from August 7, 2020 to August 25, 2020. I have spoken with Superintendent Dhillon who was aware that Superintendent Hara had reviewed the surveillance video. Superintendent Dhillon thought Superintendent Hara had saved the video. By the time Superintendent Dhillon returned from leave and realized the video

had not been saved, it was September and he was unable to retrieve the footage as the system overwrites footage every thirty days.

13. I have also spoken with Chief Nicole Goodman, who signed off on the response to the Applicant's complaint. She has confirmed that she never had a copy of the video and that the video no longer exists.

[21] I understand the Applicant's frustration with the CBSA's failure to preserve the video in response to the Applicant's complaint. Moreover, from my review of the evidence before me, it would appear that, despite the Applicant's repeated requests for clarity regarding the searches for the video and how it could be that the video was not located (the details of which I have not set out in these reasons), the first explanation that allowed for a reasonable understanding of the CBSA's conduct with respect to the Applicant's request for production of the video only came from Ms. Lanoix's affidavit.

[22] However, I am satisfied that the evidence before the Court clearly demonstrates that, at the time that the Applicant's ATIP request was made (which is what is at issue in this proceeding), the video no longer existed and thus the video cannot be ordered produced. Accordingly, I find that the CBSA properly refused to disclose the video pursuant to subsection 10(1)(a) of the *ATIA*.

[23] As a result of the explanation provided in Ms. Lanoix' affidavit, the Applicant shifted his approach on this application, both in terms of the grounds of review and the relief sought. Rather than seeking an order for production of a copy of the video, the Applicant now asserts that the CBSA failed to comply with their own document retention policy and did not act in good faith in dealing with his case. The Applicant asserts that the Superintendent had the responsibility to transfer the record and protect the evidence as soon as his complaint was filed on August 5, 2022

and even more so following their first conversation, as the Applicant explicitly mentioned he was seeking access to the video. The Applicant asserts that the Superintendent should also have known that the original Vancouver International Airport record either was destroyed or would soon be destroyed when he last spoke with the Applicant on September 4, 2020, as the policy sets out that regular recordings must be retained for no less than thirty days following the date of their creation. The Applicant asserts that the Superintendent's statement regarding the online ATIP request was intended to mislead the Applicant since the Superintendent had no intention of transferring the record to a permanent storage device. The Applicant asserts that the Superintendent's conduct constitutes a violation of the CBSA's document retention policy, a violation of subsection 67.1(1)(a) of the *ATIA* and a violation of the *Criminal Code* as he destroyed evidence that might be used in a judicial proceeding.

[24] The Applicant also asserts that the Chief and Managing Director of the Investigation provides managerial oversight and ensures that procedural responses are met on time, receives input and provides direction for the investigation. The Applicant asserts that the Chief and Managing Director of the Investigation is responsible to ensure that the CBSA document retention policy is enforced and to make sure the video evidence of the investigation is protected in the event it is required in a proceeding. By failing to properly control the investigation and make sure the video record was secured immediately following the complaint, the Applicant asserts that the Chief and Managing Director of the Investigation committed an act of negligence. Moreover, the Applicants alleges that instructing him to make an online ATIP request was not made in good faith and that it was misleading because the Chief of Operation knew the video had already been

destroyed. The Applicant asserts that the Chief and Managing Director of the Investigation was acting as part of a “cover-up”.

[25] Further, the Applicant asserts that:

Beatrice Lanoix knew the surveillance video is/was a protected record.

And therefore:

Beatrice Lanoix has been replacing searches for protected records with searches for transient records that come up “NIL” and calling it CBSA Record Retention Policy.

98. The Applicant submits that this is a violation of 67.1(1)(b) because she has falsified a record by deceptively replacing it with something else. It is intended to fool people to their detriment. The Applicant submits that this is also an act of fraud.

95. The Applicant submits that Beatrice Lanoix performed this action with the assistance of her office, the ATIP Liaison Officer in the Pacific Region and likely other Liaison Officers throughout CBSA. When the Liaison Officer gets a request that needs to be blocked, they send it to the Airport Authority to be processed and to come back NIL. This is highly illegal activity and a scam. Beatrice Lanoix is the kingpin of an operation that uses fraudulent action(s) to cover-up illegal and/or criminal activity within the CBSA.

[26] The Applicant submits that he is the victim of secondary inspection theft and record concealment designed to obstruct the investigation of his complaint.

[27] None of the aforementioned allegations are detailed in the Applicant’s Notice of Application, nor does his Notice of Application contain any request for relief beyond production of the video. Rule 301 of the *Federal Courts Rules* requires that a Notice of Application contain a precise statement of the relief sought as well as a complete and concise statement of the grounds

intended to be argued. This ensures that the Respondent has an opportunity to respond thereto, both in terms of evidence and written submissions. After the delivery of Ms. Lanoix's affidavit, the Applicant failed to obtain leave to amend his Notice of Application to attempt to seek this additional relief and to particularize the grounds of review related to this relief, which presents an obstacle to such relief being considered by the Court [see *Cumming v Canada (Royal Mounted Police)*, 2020 FC 271 at para 26; *SC Prodal 94 SRL v Spirits International BV*, 2009 FCA 88 at paras 11 to 15; *Frezza v Canada (National Defence)*, 2014 FC 32 at paras 54-55]. For this reason alone, there is no basis for the Court to consider the Applicant's new allegations and additional relief.

[28] In any event, I find that there is no evidentiary support for a conclusion of bad faith, fraud or other such egregious behaviour on the part of the CBSA that would permit the Court to review the manner in which CBSA responded to his ATIP request. The Applicant's various allegations of improper conduct on the part of numerous CBSA representatives in the handling of his ATIP request are entirely speculative and not supported by any of the evidence before the Court.

[29] Moreover, none of the newly requested relief would be available to the Applicant on this application. In relation to his request for a finding that his complaint to the OIC was well-founded, as detailed earlier, the Court lacks jurisdiction on a section 41 application to review the findings of the OIC regarding the Applicant's complaint. While the Applicant attempted to argue at the hearing that the Court has jurisdiction to consider procedural fairness issues related to the OIC's investigation, his application is pleaded solely as a section 41 application and not an application for judicial review under section 18.1 of the *Federal Courts Act*. As such, the Court has no

jurisdiction to consider any denial of procedural fairness allegations [see *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266]. In any event, the Applicant failed to plead in his Notice of Application or his memorandum of fact and law many of the procedural fairness deficiencies that he articulated at the hearing.

[30] In relation to the Applicant's request for a finding that violations of subsection 67.1(1) of the *ATIA* have occurred, subsection 67.1(1) provides that no person shall, with intent to deny a right of access under this Part, (a) destroy, mutilate or alter a record; (b) falsify a record or make a false record; (c) conceal a record; or (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c). Pursuant to subsection 67.1(2), every person who contravenes subsection 67.1(1) is guilty of an indictable offence or an offence punishable on summary conviction. It is not open to the Court on a section 41 application to make a finding regarding any such violations. Moreover, I fail to see how such a finding would otherwise fall within the scope of this Court's jurisdiction.

[31] In relation to the Applicant's request for a referral directly to the Attorney General of Canada, subsection 63(2) of the *ATIA* provides:

The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, le Commissaire à l'information peut faire part au procureur général du Canada des renseignements qu'il détient à cet égard.

[32] The power prescribed by subsection 63(2) of the *ATIA* lies solely with the Information Commissioner, not with the Court. Further, while section 49 of the *ATIA* vests the Court with a broad power to “make such other order as the Court deems appropriate”, the Court may only do so if it determines that the head of the government institution is not authorized to refuse to disclose the record at issue [see *Lambert, supra* at para 60]. There has been no such finding in this matter.

[33] Accordingly, I am not satisfied that there is any basis to grant any of the relief sought by the Applicant. As a result, the application shall be dismissed.

V. Costs

[34] As the Respondent does not seek their costs of this application, no award of costs will be made.

JUDGMENT IN T-655-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended with immediate effect to remove the Office of the Information Commissioner as a respondent and add the Minister of Public Safety.
2. The application is dismissed.
3. The parties shall bear their own costs of this application.

“Mandy Aylen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-655-21

STYLE OF CAUSE: RONALD HENDRIKX v MINISTER OF PUBLIC SAFETY

PLACE OF HEARING: VIDEOCONFERENCE

DATE OF HEARING: JULY 18, 2022

JUDGMENT AND REASONS: AYLEN J.

DATED: JULY 19, 2022

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