Federal Court Cour fédérale

Date: 20240731

Docket: T-189-19
T-190-19
T-191-19

Neutral Citation: 2024 FC 1214

Ottawa, Ontario, July 31, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

PREVENTOUS COLLABORATIVE HEALTH

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

AND BETWEEN:

PROVITAL HEALTH

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

AND BETWEEN:

COPEMAN HEALTHCARE CENTRE

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

JUDGMENT AND REASONS

Outline of Decision:

I. **Overview**

[1] Preventous Collaborative Health, Provital Health and Copeman Healthcare Centre (collectively, the "Applicants") brought an application to the Federal Court under section 44 of the *Access to Information Act*, RSC, 1985, c A-1 [ATIA] objecting to Health Canada's (the "Respondent") decision to release redacted records of audits performed by Alberta Health ("AH") on private primary health-care clinics (the "Audit Reports"). The Applicants' cases were joined because they are all in a similar situation and are leading a similar challenge.

[2] There is a long procedural history with this case that has resulted in a number of interlocutory decisions, some taken to the Federal Court of Appeal. However, by the time this case was heard, the Applicants only pled the three issues that form the basis of this decision.

[3] I dismiss the Application and authorize the release of the Audit Reports with Health Canada's already made redactions with respect to personal information pursuant s. 19(1) ATIA and to remove the redactions made under s. 20(1)(b) ATIA, for the following reasons.

II. **Brief summary of facts**

[4] Alberta Health (AH) identified the Applicants as primary health care clinics that were charging a membership fee and that may have been charging for insured services in contravention of the *Canada Health Act* [CHA]. Therefore, AH conducted an audit of the Applicants. After completing the Audit Reports, AH sent them to the Respondent.

[5] On March 13, 2017, the Respondent received an access to information request under the ATIA seeking the Audit Reports performed by AH and provided to the Respondent on private primary health-care clinics that charge patients annual enrollment and membership fees. More specifically, the Applicants requested the following information:

Copies of all audits performed by Alberta Health and shared with Health Canada on private primary health-care clinics that charge patients annual enrollment and membership fees, including three audit reports that Alberta Health shared with Health Canada in January of 2015 and any new audits of those clinics and a fourth clinic.
Copies of all correspondence between January 1, 2015 and March 13, 2017 between Health Canada and Alberta Health concerning the cessation of charges for insured services at the audited clinics and the processes that were in place to reimburse patients who had been inappropriately charged at the audited clinics.

[6] On January 11, 2019, the Respondent decided to release a redacted portion of the Audit Reports.

[7] The Applicants specifically sought three Audit Reports shared with the Respondent in January 2015.

[8] The *Canada Health Act Division* ("CHAD") of the Respondent gathered 108 pages of records relevant to the Request. The 108 pages consisted of three final Audit Reports prepared by the *Audit and Risk Analysis Unit* of AH and shared with the Respondent, along with some correspondence between AH and CHAD. The audits found that each of the three private clinics were in breach of the *Alberta Health Care Insurance Act* [AHCIA].

[9] The *Access to Information and Privacy* ("ATIP") division of the Respondent assessed which records triggered an obligation to give notice in accordance with section 27 ATIA. The Respondent decided to provide the Applicants with an opportunity to make written representations regarding disclosure of its Audit Reports.

[10] Between July 19, 2017 and December 17, 2018, the Applicants sent the Respondent written representations objecting to the disclosure of the Audit Reports in their entirety pursuant to sections 13, 14, and 20 ATIA.

[11] The Respondent advised the Applicants that the submissions pursuant sections 13(1)(c) and 14 ATIA could not be accepted as the applicability of these provisions is determined by the Respondent and not a third party. Nevertheless, the Respondent reconsidered the Applicants' representations under the light of HC's mandate and the importance of ensuring reasonable access to medically necessary health care services based on need and not the ability to pay.

Considering the present of public interest considerations, the Respondent offered the Applicants with an opportunity to make representations in order to invoke the public interest in the disclosure and issued another notice to that effect following section 27 ATIA.

[12] After considering these additional representations, the Respondent notified the Applicants by letter, on January 11, 2019, that it would be releasing a redacted version of the Audit Reports to the requestor. The Respondent exempted certain specific information in the Audit Reports from disclosure pursuant to subsection 19(1) ATIA, which refers to the disclosure of personal information and paragraph 20(l)(b) ATIA, which refers to the disclosure of confidential commercial, scientific and technical information.

[13] The Respondent is arguing that since the Applicants are not the ones who supplied HC with the Audit Reports, they cannot argue that section 20 ATIA, specifically paragraph 20(1)(b) ATIA applies to them.

[14] There is also no dispute between the parties that it was AH who conducted the audits and shared them with the Respondent voluntarily and without communication or expectation to their confidentiality. What is in dispute is whether AH's conduct was legal. The Applicants' contest the legality of AH's disclosure in its current circumstances. They also argue that their failure to abide by Alberta's provincial legislations did not exonerate the Respondent to understand its constitutional obligations that their decision to disclose was *ultra vires* to the constitutional Federal-Provincial separation of powers. Therefore, even if AH's illegal act put the Respondent in possession of the Audit Reports, the Respondent should have understood that this was a

provincial matter where the Respondent had no jurisdiction to disclose what did not lawfully belong to them.

[15] Pursuant to section 27 ATIA, the ATIP Division of the Respondent had the obligation to give notice of some of the requested records. The Applicants were notified by the Respondent of the disclosure and were given the opportunity to make representations on more than one occasion.

III. **Issues:**

[16] This case is subject to a long procedural history that began in 2019 in front of the Federal Court. Despite its long history, the hearing took place with the parties narrowing down the issues to the following:

a) Can the Respondent release the Audit Reports notwithstanding the exemption under s. 20(1)(b) ATIA?
b) As a matter of law, are the Audit Reports in the possession of the Respondent?
c) As a matter of constitutional law, can the Federal Government release documents that belong to the Province of Alberta?

A. *Standard of Review:*

[17] The parties state, and I agree, that as per the operation of section 44.1 of the ATIA, the standard of review in a section 44 ATIA case is a *de novo* hearing by this Court.

[18] This means that this Court must treat this application as a new proceeding and determine whether the reviewed decision is correct. It is up to this Court to “step into the shoes” of the initial decision maker and determines the matter on its own to decide whether the information at issue is exempt, or not, from disclosure. (see *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153, at paras 12-14; *Matas v Canada (Global Affairs)*, 2024 FC 88, at paras 11-12 and citing *Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2021 FC 138, at paras 64 and 68)

B. *General legal Principles:*

[19] In *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 [*Merck Frosst*] the Supreme Court of Canada (“SCC”) recognizes that the main challenge of the appeals is to determine how to interpret and apply the ATIA so that it strikes the balance Parliament intended between broad rights of access and protection of third-party information. It states that the ATIA is intended to be given a broad and purposive interpretation, and that it is a foundation of a democratic society (*Merck Frosst*, at para 22). However, this must be balanced with the confidential, commercial and related information of a third party to promote innovation and development (*Merck Frosst*, at para 23). This is why a number of procedural safeguards are contemplated, including an independent review of the application of the law by the Courts (*Merck Frosst*, at para 23).

[20] In sum, the SCC identified the purpose of the ATIA to give access to information in records under government control.

[21] The purpose of the ATIA is to provide a right of access to information in records under the control of a government institution. The ATIA has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (subsection 2(1) ATIA).

[22] The SCC also makes it clear that the burden is on the third party to establish on the balance of probabilities that disclosure should not be made and that while exemptions are the exception, the disclosure of the information is the general rule – with any doubt being resolved in favour of disclosure (*Merck Frosst*, at paras 92-95).

(1) Can the Respondent release the Audit Reports or are they exempted pursuant paragraph 20(1)(b) ATIA?

[23] It will be helpful to set out the key elements of the legislative framework before entering into an analysis of the issues.

[24] The starting point is section 2 of the Act, the purpose clause:

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.

Complementary procedures

(3) This Act is also 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.

Étoffement des modalités d'accès

(3) En outre, 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.

Information not "supplied" by Applicants as required by paragraph 20(1)(b)

Third-party information

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains

[…]

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

[…]

Renseignements de tiers

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

[…]

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[…]

[25] The confidential information exemption in paragraph 20(1)(b) ATIA is a class-based exemption. As such, the information must be redacted once it is established that the information in question meets the requirements of the section: *Merck Frosst*, at para 99; *Bombardier Inc. v Canada (Attorney General)*, 2019 FC 207, at para 42 [*Bombardier*].

[26] The test for the application of paragraph 20(1)(b) ATIA is as follows by Madam Justice Turley *in American Iron & Metal Company Inc. v Saint John Port Authority*, 2023 FC 1267 [*AIM*], at para 47:

> [47] The party seeking to resist disclosure must demonstrate that the information is: (i) financial, commercial, scientific, or technical information; (ii) confidential information; (iii) supplied to a government institution by the third party: and (iv) consistently treated in a confidential manner by the third party. All four of these requirements must be met before the information is exempted from disclosure: Canada (Office of the Information Commissioner) v Calian Ltd, 2017 FCA 135 at para 51 [Calian]; Concord Premium Meats Ltd v Canada (Food Inspection Agency), 2020 FC 1166 at para 96 [Concord]; Samsung at paras 60-61; Bombardier at paras 43-44.

[27] As seen, the test is conjunctive and the inapplicability of any of the conditions negates the application of paragraph 20(1)(b) ATIA.

[28] There is a dispute between the parties as to whether any of the Applicants supplied the Respondent with the Audit Reports subject to this application. The Respondent focus on the factual history of this case and argue that since AH provided the Audit Reports to the Respondent, s. 20(1)(b) of ATIA, which exclusively applies to information provided by a third party, does not apply in this case.

[29] By contrast, the Applicants argued that even though the audit was conducted by AH and that AH provided them to the Respondent, its content was based on information the Applicants provided, and that not seeing them as third parties for the purposes of paragraph 20(1)(b) ATIA is therefore an "artificial distinction."

[30] I reject equating AH, who conducted the audits into the practices of the Applicants, with the Applicants under review. Therefore, the Applicants as third parties did not supply the information to the Respondent.

[31] I am persuaded by my Justice Turley's interpretation in *AIM* to conclude that paragraph 20(1)(b) ATIA does not apply:

> [54] Given the requirements under paragraph 20(1)(b) are conjunctive, my finding that AIM did not "supply" the information in question to Port Saint John is sufficient to dispose of AIM's reliance on this exemption. As Justice Diner aptly stated, "the failure to establish any one of the four criteria will be fatal to a third party's claim for an exemption": Samsung at para 61.

Paragraph 20(1)(b) ATIA: confidentiality
Reasonable expectation of confidentiality

[32] Even though my conclusion on the inapplicability of paragraph 20(1)(b) ATIA for the foregoing reasons is dispositive of the Applicants' argument on this section, given the time and energy the Applicants spent at the hearing to address this additional argument, I will further address it.

[33] The Applicants argued that the paragraph 20(1)(b) ATIA creates an exemption to the disclosure of the entire Audit Report, without the need to get into it, based on the operation of

provincial legislation, which in the Applicants' opinion created a legitimate expectation of confidentiality.

[34] For greater clarity, the Applicants relied on the application of sections 22, 31, 35 and 39 of the AHCIA to argue that there was a reasonable expectation by the Applicants that AH would maintain the confidentiality of the results of the audit. Simply put, the entire information in the Audit Reports is confidential information by the operation of the AHCIA.

[35] I find that the Applicants are misconstruing the application of the AHCIA, which is meant to protect the privacy of Albertans who obtain health care, and it is not about making audit or compliance reports confidential.

[36] This is confirmed through section 20.3(1)(b) of the AHCIA which follows the definition of "personal information" that is found in the *Freedom of Information and Protection of Privacy Act* which defines it in section 1(n) as "recorded information about an identifiable individual" (our underlining) which is not the type of information found in the disputed Audit Reports. The type of personal information protected by the AHCIA includes information such as names, addresses, phone number, ethnic origin, political or religious beliefs, and many other information of a personal nature, but the disputed Audit Reports simply offer information concerning health clinics and their financials. Any information of a personal nature, such as doctors' names for example, have been redacted by the Respondent.

[37] It is also important to remember that the Respondent consulted AH on the issue of confidentiality of the Audit Reports and AH did not request them to be treated in a confidential manner. The Applicants have not pointed to contrary evidence to this.

[38] The Applicants rely on *Canadian Imperial Bank of Commerce v Canada (Chief Commissioner, Human Rights Commission)*, 2007 FCA 272 [*CIBC*] to argue that the Audit Reports must be confidential. They largely argue that similar to this case, the provisions of another legislation in CIBC had created a reasonable expectation of confidentiality that ultimately made the FCA find the documents in question exempt under paragraph 20(1)(b) ATIA.

[39] In *CIBC*, The Canadian Human Rights Commission (the "Commission") performed an audit on CIBC's compliance with the federal *Employment Equity Act*, S.C. 1995, c. 44 [*EAA*]. The Commission then issued the "CIBC Interim Employment Equity Report" (the "Interim Report") to CIBC. The Commission received a request to disclose the Interim Report in 2003, but it did not disclose it, citing paragraph 20(1)(b) ATIA.

[40] What is important to note is that the relevant sections of the *EAA* created a legal privilege that was the underlying cause for the confidentiality. By contrast, the *AHCIA* does not create any expectation of confidentiality for such audits, let alone a privilege:

***Alberta Health Care Insurance Act*, RSA 2000, c A-20**

Privileged information **34 (1)** Information obtained by the Commission under this Act is privileged and shall not knowingly be, or	**Protection des renseignements** **34 (1)** Les renseignements obtenus par la Commission dans le cadre de la présente loi sont protégés. Nul ne peut sciemment

be permitted to be, communicated, disclosed or made available without the written consent of the person from whom it was obtained. […]	les communiquer ou les laisser communiquer sans l'autorisation écrite de la personne dont ils proviennent. […]

[41] In 2004, the Commission received a request to disclose its final CIBC Employment Equity Report (the "Final Report"). The Commission announced it intended to release the Final Report, and in doing so, stated that its decision not to release the Interim Report had been based on paragraph 16(1)(c) of the ATIA, and not on paragraph 20(1)(b) as it had indicated earlier. CIBC applied to the Federal Court for judicial review of the decision to release the Final Report.

[42] CIBC argued that the Final Report should be protected from disclosure because it contained "financial, commercial, scientific or technical" information that was "confidential information supplied by a government institution by a third party" under paragraph 20(1)(b) ATIA. The Application Judge accepted that the CIBC information was commercial information, however, not that it was confidential information, because the information in the Final Report was similar to that disclosed in CIBC's public annual reports, with a few exceptions. The Application Judge also rejected CIBC's contention that it had a reasonable expectation that the Final Report would not be disclosed, as the Commission advised CIBC that it was subject to the ATIA and that the information may be released if it was not exempt under the ATIA.

[43] CIBC appealed the Federal Court decision, and the Federal Court of Appeal ("FCA") discussed the appropriate application of the test with respect to the public benefit aspect when exemptions are claimed under the ATIA.

[44] The FCA determined that CIBC did have a reasonable basis for its belief that the information it provided to the Commission would remain confidential. The FCA found that the Application Judge erred in concluding that the information in the Final Report was not exempt from disclosure under paragraph 20(1)(b) ATIA and found that the Final Report should not be disclosed.

[45] The applicants also argue that the case set out the test for whether information is confidential. It stated that was not whether information of the same kind is available in the public record, but whether the specific information can be found there. The Application Judge applied the wrong test. The next portion of this test was "whether there is an objective basis for saying the information was communicated in the expectation that it would be kept in confidence." The FCA rejected the Applications Judge's decision that the information was not communicated in confidence.

[46] I find that the nature of this case is fundamentally different from *CIBC*. In the case at bar, AB consulted and volunteered the audit report. The audit report was done to ensure that the Applicants are in compliance with their legal obligations. The Alberta legislation in question does not create a requirement of confidentiality for audits and it is mainly applicable to individual health record. Also, unlike in *CIBC*, the Applicants here are not considered the "third party" for the purposes of the paragraph 20(1)(b) test.

[47] Moreover, much of the audit materials were taken from the clinics' promotional materials in various sources. I agree with the Respondent that the evidence of the Applicants' managing

directors are based on generalities without pointing to any specific evidence of a breach in the audits.

[48] During the hearing, the Respondent referred to the *Parkland Institute's* report on Private membership clinics in Alberta, which charge annual membership fees for combined physician and complementary practitioner care where case studies of the Audit Reports have been made. The Parkland Institute's report entitles "Blurred Lines: Private Membership Clinics and Public Health Care" [Blurred Lines Report] is publicly available online and was released in November 2017.

[49] The Respondent namely used the Blurred Lines Report to further prove that most of the information disputed by the Applicants is publicly available and therefore cannot be subject to the exceptions found in the ATIA.

[50] During the hearing, the Respondent's counsel addressed various sections of the Blurred Lines Report to demonstrate how the information found in the Audit Reports was already available to the public. For example, in the Report, there is a mention of the Applicants' clinics as well as the business model they use, i.e., membership model. The Report also sets out the fees of each clinic, such as their membership fees, the price of various packages as well as renewal fees. Quotes from the founders and heads of the Applicants' clinics can also be found alongside public statements from Health's Minister Sarah Hoffman regarding new audits in the Legislature, making the auditing process that the Applicants have undergone, very public.

[51] In light of the above, the Respondent does not believe that there are any grounds to the Applicants' allegations of confidentiality in the Audit Reports, and I agree with them.

[52] HC has redacted parts of the Report to further comply with their legislative requirements, as submitted in the Respondent's compendium in the tables of exemptions:

Preventous Collaborative Health

Audit Report	Page No.	Exemption	Type of Information	Rationale
Preventous	12	20(1)(b)	Breakdown of charges for each service in the Total Health Assessment	Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem
	15	19(1) and 20(1)(b)	• Physicians Woodward, Bissoondath, Grover, Grewal, Taylor, Hong, billing amounts to the Alberta Health Care Insurance Plan through Preventous and outside Preventous • Health service codes claimed by Physicians through Preventous, and number of claims and claims amount	19(1) Personal information: doctors names, specialties and the amount of billings Under the ATI act, the Physicians names are their personal information since they are identifiable individuals. The amount of billings and source of the billings relates to identifiable doctors and their business practices. Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem

Provital Health and Wellness Report

Audit Report	Page No.	Exemption	Type of Information	Rationale
Provital	7	20(1)(b)	Breakdown of charges for each service in the Comprehensive Health Assessment for the original allocation and the August 15, 2014 allocation	Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem
	8	20(1)(b)	• Physicians Kreutzer, Sengar and 3 others (combined) billing amounts to the Alberta Health Care Insurance Plan through Provital and outside Provital • Health service codes claimed by Physicians through Provital, and the number of claims and claims amount	Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem

Copeman Healthcare Centre Report

Audit Report	Page No.	Exemption	Type of Information	Rationale
Copeman	8	19(1) and 20(1)(b)	• Physicians names and specialties • Amount of Billings to the Alberta Health Care Insurance Plan per physician • Health service codes claimed by 2 individual physicians through Copeman, and the number of claims and claims amount • An individual physicians workday schedule	19(1) Personal information: doctors names, specialties and the amount of billings Under the ATI act, the Physicians names are their personal information since they are identifiable individuals. The amount of billings and source of the billings relates to identifiable doctors and their business practices. Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem
	9	19(1) and 20(1)(b)	• Name of physician • Services included to paid members • Test performed by an individual physician	19(1) Personal information: doctors names, specialties and the amount of billings Under the ATI act, the Physicians names are their personal information since they are identifiable individuals. The amount of billings and source of the billings relates to identifiable doctors and their business practices. Section 20 Financial Commercial information: rates for specific services and therefore severed like a per diem
	15	19(1)	• Physicians names and specialties • Health service codes claimed by an individual physician for performing a comprehensive consultation	Under the ATI act, the Physicians names are their personal information since they are identifiable individuals. The amount of billings and source of the billings relates to identifiable doctors and their business practices.
	16	19(1)	Physicians names	Under the ATI act, the Physicians names are their personal information since they are identifiable individuals.

[53] The Respondent is of the opinion that these original redactions made by HC are the only ones that fall within sections 19(1) and 20(1)(b) ATIA. Where the parties differ is on the rest of the content of the Audit Reports: the Applicants believe that its entirety falls under paragraph 20(1)(b) ATIA whereas the Respondent does not believe that it is the case. I agree with the Respondent that *Samsung Electronics Canada Inc. v Canada (Health)*, 2020 FC 1103 [*Samsung*] is the more analogous case where this Court found that there was no expectation of confidentiality where the disputed records were submitted as a result of the applicant's legal obligations (*Samsung*, at para 55). However, this Court does not agree entirely with the Respondent's interpretation of the already redacted portions of the Reports.

[54] Even though the redactions made under s. 19(1) ATIA, which covers the physicians names and other personal information, should be maintained uniformly throughout the Reports,

the redactions made under s. 20(1)(b) ATIA cannot be maintained as this section does not apply. The Applicants have failed to discharge their onus to establish that the Audit Reports are based on confidential materials and the application of the s. 20(1)(b) ATIA exemption.

[55] This Court finds that the redactions made by HC to the financial information of the Reports should be removed as I have already found that the s. 20(1)(b) ATIA does not apply to the Audit Reports.

(2) Does confidentiality serve Public Interest

[56] The Applicants argued that because the application of the provincial legislation creates a legitimate expectation of confidentiality, it is in public interest to uphold it.

[57] First, as stated above, the Applicants' argument is based on a misconstrued reading of the provincial legislation, intended to protect the health records of Albertans seeking health care.

[58] Second, the Applicants' argument is oblivious to the strong public interest for obtaining access to information (see *Merck Frosst*, at para 23 and *Toronto Sun Wah Trading Inc. v Canada (Attorney General)*, 2007 FC 1091, at para 23, affirmed by 2008 CAF 239).

[59] In the case at hand, the Applicants are arguing that information of individuals should be protected but they do not explain how it is in the public interest to not disclose that information. During the hearing, the Applicants even argued that by allowing the disclosure of the Audit Reports, it could lead to a distrust from health clinics that might simply refuse to cooperate in

future auditing process. In *Samsung*, the applicant submitted a similar argument (see *Samsung*, para 107) but the Court dismissed it and concluded that exempting the disclosure of the disputed records would undermine the strong public interest in obtaining access to information and not enhance the public interest (*Samsung*, at paras 108 and 109).

(3) Control: Is HC in control of the Audit Reports

[60] The Applicants argue that the Respondent never had legal authority over the Audit Reports and that mere possession does not constitute control. In effect, while there is nothing confidential about the Audit Reports, they want to withhold their release in their entirety.

[61] The facts are not in dispute: AH conducted the audit and provided it to HC with no conditions, including on confidentiality. There is no dispute that HC has been in possession of the Audit Reports in question.

[62] The Applicants argue that physical possession by a government institution does not establish the requisite condition of control, especially under the present circumstances where AH provided the audits with disregard to the confidentiality requirements of their own provincial legislation, and therefore illegally disclosed it.

[63] In short, the Applicants argue that AH did not have the legal authority to provide the documents to HC in the manner that it did. For this perceived breach of AH, approximately 8 years ago, the Applicants complained to the Alberta Privacy Commission (the “Commission”).

The Applicants do not dispute this but they have not provided me with any evidence of a decision by the Commission that could shed light on this argument.

[64] The onus is on the Applicants to establish that AH engaged in an illegal act to voluntarily disclose the Audit Reports to HC and they have not discharged their onus to point to any evidence that could shed light on this.

[65] In fact, the case the Applicants rely on also supports the proposition that control is given a broad and liberal interpretation as seen in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306, at paras 48 and 52-56 [*National Defence*], where the Supreme Court of Canada acknowledges that the absence of definition of the term "control" in the ATIA allows for an understanding of the term in its ordinary and popular meaning. Furthermore, in order to ensure a meaningful right of access to government information, the interpretation should be broad and liberal and take into account various factors to determine whether records are under government's control or not, such as the content and circumstances of the creation of the record. Ultimately, the dictionary definition of "control" means that there is some sort of authority exercised by a senior official, other than the Minister, over a document.

[66] The Court analyzes the Commissioner's approach in its interpretation of "under the control" as being broad to essentially prevent government offices from hiding sensitive records, but it disagrees that – in this case – the lower courts made an error. Even though the Supreme Court agrees that the new test suggested by the Commissioner to address this issue disregards the

distinction between government institutions and Minister’s offices, the Supreme Court agrees with the appellate court’s decision to maintain a broad interpretation of “control” but not to the extent of extending the ATIA’s jurisdiction into Minister’s offices, which have been explicitly excluded by Parliament. The Court then outlines a two-step inquiry into control: first, determining if the record pertains to a departmental matter, and second, assessing whether the government institution could reasonably obtain a copy of the record upon request. This approach respects the distinction between government institutions and Ministers' offices while ensuring transparency and access to government information.

[67] First, I find that in this case, there is nothing sensitive about the information found in the Audit Reports, which were based largely on publicly available documents, including on promotional materials of the Applicants.

[68] Most importantly, the Supreme Court of Canada set out the two-part test when the government is not in control of the documents (*National Defence*, at para 54), which is clearly not the case here. In the case at bar, HC is in control of the documents.

[69] Moreover, physical possession of documents matter, and that there is no dispute that HC was in possession of the reports when AH disclosed them voluntarily. In *Ottawa Football Club v Canada (Minister of Fitness and Amateur Sports)*, 1989 CanLII 9491 (FC), [1989] 2 FC 480, at page 485, the plain meaning of subsections 2(1) and 4(1) ATIA applied to documents that happened to be within the custody of the government, regardless of means by which custody was obtained:

> The plain meaning of the language employed in the Act does not suggest that "information", "government information", or "record under the control" of the Government must be limited by some test as to how and on what terms the information or record came into the hands of the Government. That is the kind of qualification which the CFL is asking me to create. I can find no basis for doing so. The plain meaning of subsections 2(1) and 4(1) as quoted above is that the Act gives access, subject to many exceptions, to any record, or information in a record, which happens to be within the custody of the government regardless of the means by which that custody was obtained. That is surely the interpretation which is also most consistent with the purpose of the Act. The interpretation advanced by the CFL on the other hand, appears to be inconsistent with paragraph 20(1)(b) which it also relies on: that paragraph obviously assumes that "confidential information supplied to a government institution by a third party" is prima facie within the definition of "record" to which access would otherwise be available were it not for the possible protection of this paragraph. In other words, this exception proves the rule that confidential material supplied by a third party to the Government can form all or part of a "record under the control of a government institution". It will be noted that the word "supplied" in paragraph 20(1)(b) is not modified by any terms such as "under compulsion".

[70] The importance of physical possession granting control was further confirmed by *Canada Post Corporation v Canadian Human Rights Commission,* 1997 CanLII 16378 (FC). In that case, the main issue was whether documents compiled by Public Works Canada in relation to a contract it had with Canada Post, were "under the control of a government" […].Mr. Justice Rothstein (as he then was) held that the documents were under the control of Public Works and The Court of Appeal upheld the decision as the definition of "control" should be given a broad interpretation.

[71] Second, the audits were performed to ensure compliance with the health care legislations. When the funding of AH would depend on HC's satisfaction of compliance, and that any fees charged are deducted from transfer payment as per the application of the legislation (paragraph

13(1)(b) CHA), and that HC consulted AH on the disclosure of the Audit Reports and that they were voluntarily and unconditionally disclosed, I am satisfied that the record was obtained or generated lawfully on HC's behalf.

[72] I am also satisfied that HC's actions in this case are consistent with a reasonable and lawful exercise of HC's departmental powers, duties or functions.

[73] I therefore disagree with the Applicants that the Respondent acted contrary to their legislative authority. The Applicants advanced this argument again by misconstruing the application section 22 AHCIA. In effect, they argued that because of section 22 AHCIA, the Respondent had no authority to exercise control over the very Audit Reports that were prepared to ensure compliance with the provisions of the CHA. It is hard to understand the logic of how HC can expect compliance, where the funding it provides depends on that compliance if it cannot exercise control over audit reports on compliance. I reject this argument as it defies a logical chain of reasoning.

[74] HC was in legal possession of the Audit Reports and as such, it had control over them.

Additional points: sections 25 and 20(6) ATIA

[75] Subsection 20(6) ATIA provides that in the event that paragraph 20(1)(b) ATIA applied to this case, the head could engage in a public interest assessment to see whether public interest outweighed any prejudice to the Applicants. I would therefore have the option of sending the case back for a subsection 20(6) ATIA public interest assessment. However, since I have

unequivocally found that paragraph 20(1)(b) ATIA exemption does not apply, this will not be necessary.

[76] I also note that The Applicants make no submissions on the matter being returned to HC for a determination under subsection 20(6) ATIA if the Court finds that the exemptions of subsection 20(1) ATIA.

Severance – section 25 ATIA

[77] Similarly, since I have found that the Applicants have failed to establish that an exemption applies to them under the only ground they argued, i.e., paragraph 20(1)(b). I therefore find that potential severability under section 25, which is predicated on finding of an exemption, does not apply.

(4) Constitutional Argument: Would the release of the report by Health Canada be *ultra vires*?

[78] The Applicants argue that it was unconstitutional for HC to release the Audit Reports, as it is a matter that is solely within provincial jurisdiction.

[79] The Applicants are of the opinion that the Audit Reports prepared by AH contain information about a provincial health system and therefore is a matter that is purely local or private in nature, which falls within the scope of section 92 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 [*Constitution Act 1867*]. Allowing the release would, according to the Applicants, only create a precedent that would allow anyone seeking information on matters of public policy at another level of government if one has refused it.

[80] The Respondent, on the other hand, argues that the constitutional challenge made by the Applicants does not concern the ATIA or the CHA but the release of the Report by AH to HC. According to the Respondent's submissions, the Applicants are suggesting that Canada is constitutionally prohibited from releasing records under its control and in compliance with the ATIA for the simple reason that it falls under a provincial jurisdiction pursuant to the *Constitution Act 1867*. In this particular case, AH voluntarily provided HC with the Audit Reports in order for HC to monitor Alberta's compliance with the CHA. AH did not request for the Audit Reports to remain confidential nor did it object to the release of the Reports.

[81] I agree with the Respondent. I also note again that there is no evidence before me to suggest that AH did not have the authority to provide the audit reports to HC. As the Respondent has argued, the Applicants' potential recourse should probably be aimed towards AH and not HC. AH is the entity responsible for the release of the Reports and decided to share it with HC without taking any precautions to ensure its confidentiality, and there is no evidence before me to suggest that AH's release of it was either not legal, or that it triggered a positive duty for HC to ignore it.

[82] The constitutionality is also not at play in the present matter. As mentioned by the Respondent, section 13 ATIA explicitly contemplates the possibility of a federal government institution being in control of information obtained through the government of a province or institution thereof (see paragraph 13(1) (c) ATIA). Furthermore, HC did not seek to compel AH to do anything as the Reports were voluntarily given to HC, which triggers the application of paragraph 13(2)(a) ATIA that allows the disclosure of the documents shared by an institution found under

subsection 13(1) ATIA if they consent to it. This is especially true when one takes into account the fact that there seems to be no evidence of AH's intention to ever submit the Report in confidence even though AH and HC cooperated for years on the audits of the clinics, as it was not stated at any point with HC, which further tips the scale towards an absence of expectation of confidentiality by AH.

[83] For these reasons, I find that the release of the Audit Reports by HC are not *ultra vires.*

IV. Costs:

[84] At the hearing, the parties agreed that costs in the cause should be ordered in the amount of $18,500 inclusive of disbursements. Since I have found in favour of the Respondent, the Applicants must pay these costs to the Respondent.

JUDGMENT in T-189-19, T-190-19 and T-191-19

THIS COURT ORDERS that:

1. The application under section 44 of ATIA is dismissed.
2. The Audit Reports at issue be disclosed in full, except for the personal information already redacted pursuant s. 19(1) ATIA and the added following personal information:

Preventous Collaborative Health Report

a) Page C177 – Names, position and links between individuals in the "Background" section.

b) Page C181 – Name in the last paragraph.

c) Page C187 - Table 3 physicians' names and specialty.

d) Page C187 – Names in the first paragraph under table 4.

e) Page C189 – Names and positions.

f) Page C192 – Name, position and contact information.

Provital Health and Wellness Report

a) Page C245 – Names and workplace information in the "Background on Provital" section.

b) Page C248 – Names and workplace information.

c) Page C249 – Names and specialties in Table 2.

d) C251 – Name in the last paragraph.

e) C256 – Names in the "Exit Conference Dialogue and Response" section.

f) C257 – Names.

g) C259 – Name and contact information.

Copeman Healthcare Centre Edmonton Report

a) Page C300 – Names and position.

b) Page C303 – Names.

c) Page C311- Name and position.

d) Page C314 – Names, positions and contact information.

3. The whole, with costs in the amount of $18,500, inclusive of disbursement, as agreed by the Parties, to be paid by the Applicants to the Respondent.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-189-19 T-190-19 T-191-19
STYLE OF CAUSE:	PREVENTOUS COLLABORATIVE HEALTH v. CANADA (MINISTER OF HEALTH) PROVITAL HEALTH v. CANADA (MINISTER OF HEALTH) COPEMAN HEALTHCARE CENTRE v. CANADA (MINISTER OF HEALTH)
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 7, 2024
JUDGMENT AND REASONS:	AZMUDEH, N
DATED:	JULY 31, 2024

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