Federal Court  Cour fédérale

Date: 20100316

Docket: T-367-09

Citation: 2010 FC 302

Ottawa, Ontario, March 16, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PROVINCIAL AIRLINES LIMITED

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Provincial Airlines Limited applies for a review of a decision by the Assistant Director, Access to Information and Privacy, Public Works and Government Services Canada (PWGSC) to disclose certain records pursuant to a request made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the *Act*).

[2] Subsection 44 (1) of the *Act* provides a third party, to whom the head of a government institution is required to give notice of a decision to disclose a record, may apply to the Court for a review of the matter.

[3] The Applicant claims the records sought for disclosure by the Access to Information and Privacy Directorate contain confidential information pertaining to the Applicant, the disclosure of which is prohibited by section 20 of the *Act*.

BACKGROUND

[4] The Applicant provides maritime aerial surveillance services to the Department of Fisheries and Oceans (DFO) under a contract awarded in March 2004. It maintains and operates a fleet of four twin engine Beechcraft airplanes stationed on Canada's east and west coasts.

[5] The Applicant's services include low level flying to capture surveillance data in specific areas of Canada's coast and oceans, including surveillance and monitoring of vessel locations. The information gathered and provided to DFO includes electronic data, radar information, photos, charts and reports for purposes of fisheries management and law enforcement. The information is shared with the Department of National Defence (DND), RCMP, and other organizations for detection of illegal fishing, drug offences, and national defence purposes.

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[6] The DFO contract was re-tendered by a Request for Proposals (RFP) in 2008. The Applicant satisfied the increased security clearance required and was awarded the contract. The increased security requirement included clearances from the Canadian Industrial Security Directorate (CISD) which is administered by PWGSC. The CISD Industrial Security Manual requires organizations cleared under the Industry Security Program to refrain from publicizing their security status.

[7] The PWGSC had commissioned a report from Deloitte and Touche, an accounting and consulting firm, "… to assess the possibility of potential or actual security breaches in 355 PWGSC active files …". The Deloitte and Touche Report includes two pages in Appendix D which contain information concerning the Applicant's then current security clearances, expresses an opinion about the Applicant's level of security and discusses the Applicant's request for an upgrade of its security clearance in anticipation of the renewal of its contract.

[8] The Deloitte and Touche Report fell within the ambit of a request to PWGSC under the *Act* for:

> "Third-Party review of active PWGSC files to ensure procedures were followed under the Industrial Security Program, as per page 43 of the Department's Report on Plans and Priorities: 2008-2009."

[9] PWGSC identified the information requested and followed up with its obligations under the Act. These obligations included providing concerned parties with notice about the information to be disclosed and providing an opportunity to challenge that decision. PWGSC

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consulted DND, DFO and the PMO about the intended disclosure and none of those parties objected to it. The *Act* also requires PWGSC to notify third-parties that may have provided information to the minister in a confidential manner to either seek a waiver for its release or to afford them the opportunity to make submissions opposing release.

[10] On January 20, 2009 PWGSC advised the Applicant of the request for records which might contain information, which could be exempt under section 20 of the *Act* and requested, pursuant to section 27, written representations on whether records should be disclosed. On February 10, 2009 the Applicant submitted written submissions to PWGSC pursuant to section 28 of the *Act* contending that the records should not be disclosed as they were exempt under subsection 20(1) and otherwise should not be disclosed by virtue of sections 15 and 16.

[11] On February 19, 2009 PWGSC informed the Applicant of its decision to disclose the records in full without giving reasons for its decision.

[12] The impugned records have been provided to the Court. They are under a confidentiality order.

ISSUE

[13] The issue in this application is whether the impugned records are exempt from disclosure pursuant to subsections 20(1)(b), (c) or (d) of the *Act*?

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LEGISLATION

[14] A Canadian citizen has a right to access records under the control of a governmental institution. Section 4 provides for disclosure of information contained in the records of the government:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is (a) a Canadian citizen, or (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.	4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande : a) les citoyens canadiens; b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

[15] Section 20 of the *Act* contains exceptions claimed by the Applicant, in particular subsections 20(1)(b) - confidential information, 20(1)(c) - information that could on disclosure cause financial loss or prejudice, and 20(1)(d) - information that could on disclosure interfere with contractual or other negotiations. These subsections read:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains (b) financial, commercial, scientific or technical	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,

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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;	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;
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

STANDARD OF REVIEW

[16] A formal standard of review analysis is not necessary in every case. Where the standard of review on an issue before the Court is well settled by past jurisprudence the reviewing court may apply that standard of review: *Dunsmuir v. New Brunswick* 2008 SCC 9 para. 57.

[17] Madam Justice Elizabeth Heneghan found in *Canada Post Corp. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 270, the standard of review concerning an exemption to access pursuant to section 20 of the *Act* is correctness. I conclude this is the appropriate standard in this case.

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[18] Given the standard of review is correctness; no deference is due to the decision maker. The Court's function "is to consider the matter *de novo* including, if necessary, a detailed review of the records in issue": *Air Atonabee Ltd. v. Canada (Minister of Transport),* [1989] F.C.J. No. 453.

ANALYSIS

[19] The purpose of the *Access to Information Act* is to establish that disclosure of records is the rule, not the exception, therefore the onus of proof rests on the party seeking to exempt records from disclosure. *Canadian Tobacco Manufacturer's Council v. Canada (Minister of National Revenue),* 2003 FC 1037 at paras. 32, 34 and 35 (*Canadian Tobacco Manufacturer's Council*).

[20] The Applicant submits the records fall within the exemption set forth in subsection 20(1)(b) as they contain confidential commercial information supplied by the Applicant to the government in confidence.

[21] Subsection 20(1)(b) provides:

> …commercial … 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;

[22] The Applicant submits the information is "commercial" as that term is understood. It possesses various security status clearances that it requires to carry out its business under

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commercial contracts with DFO. The Applicant also submits the information surrounding its security status, the reasons it applied for increased security status and information relating to whether the Applicant deals with “protected” information, is confidential. Finally, the Applicant submits its security status constitutes confidential information since the CDIS-ISM manual prohibits public disclosure of its security status.

[23] What requires examination is whether the information is commercial, is confidential in nature and is supplied to the government by the Applicant.

[24] The Federal Court of Appeal in *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 at para. interpreted section 20 with the help of dictionary to find the meaning of the word “commercial”. It wrote:

> Common sense with the assistance of dictionaries (*Air Atonabee Ltd. v. Canada (Minister of Transport*), (1989), 37 Admin. L.R. 245 (F.C.T.D.) dictates that the word “commercial” connotes information which in itself pertains to trade (or commerce).

[25] In *Brainhunter (Ottawa) Inc. v. Attorney General of Canada and Canada (Minister of Public Works and Government Services)*, 2009 FC 1172, the Court decided that the information that pertains to the way a company satisfies the requirements of an RFP (Request for Proposals) is not information that is necessarily commercial in nature.

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[26] In my view, a security designation assigned by the government does not in itself pertain to trade or commerce. Such security designations relate to safeguarding of information rather than engaging in trade or commerce.

[27] Further in para. 69 in the *Safety Board* case, the Federal Court of Appeal found a distinction between information acquired in the course of doing business and information that was "commercial":

> It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data, or information collected during an air flight may be characterized as "commercial".

[28] I am of a similar view that government security clearances are information related to an enterprise's capacity to maintain confidentiality rather than related to the ongoing conduct of business. As such a security clearance is not commercial information as intended by subsection 20(1)(b) of the *Act*.

[29] In addition to the security designation, the Applicant says two other pieces of information constitute commercial information. First, the Applicant had proposed the security requirement for the DFO contract be upgraded. However, this information is not commercial in that it is merely a suggestion to the government that the security requirement for the upcoming DFO contract be upgraded. The second relates a sponsorship request was submitted to CISD for greater security clearances in relation to the upcoming contract. This latter information does not

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explicitly link the Applicant with the request but more importantly, given security clearances are not in themselves commercial information, neither is a request for security clearance.

[30] The Applicant argues the clearances are confidential. There is no issue that the Applicant's security clearance is information that is treated confidentially by the Applicant. The CSID-ISM Manual requires the Applicant not publish information about its security clearance. However, that cannot be the end of the inquiry.

[31] Mr. Justice Barry Strayer held in *Société Gamma v. Canada (Secretary of State)*, (1994) 79 F.T.R. 42 at para. 8:

> … when a would-be contractor sets out to win a government contract he should not expect that the term upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from disclosure obligations of the Government of Canada as part of its accountability.

[32] In *Canada Post Corp. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 270 at para. 40 the Court observed bidders for government contracts should know there is no expectation that documents submitted on a bid will be insulated from the government's obligations to disclose as part of its accountability for spending public funds.

[33] In *Air Atonabee* at para. 37 Justice McKay observed:

> Information has not been held to be confidential, even if the third party considered it so, where it has been available to the public from some other source (*Canada Packers Inc. v. Minister of Agriculture*, [1988] 1 F.C. 483 |(T.D.), and related cases, appeal dismissed with variation as to reasons on

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> other grounds, [1989] 1 F.C. (F.C.A.)), or where it has been available at an earlier time or in another form from government (*Canada Packers Inc., supra*; *Merck Frosst Canada Inc., supra*). Information is not confidential where it could be obtained by observation albeit with more effort by the requestor (*Noel, supra*).

[34] The Respondent's evidence discloses the tender documents for the renewed DFO contract awarded to the Applicant set out the required security designations and state that the successful bidder must "hold a valid facility security Clearance at the level of SECRET". Since the Applicant was successful in obtaining the contract renewal, its security clearance is implicitly revealed.

[35] I am also mindful that the interested government agencies, PWGSC, DFO, DND and PMO do not object to the disclosure of the designation. While the CISD-ISM Manual requires the Applicant not publicly disclose its security status, the Manual cannot constrain the government from doing so when it decides to in compliance with a lawful requirement to release the information under the *Act*.

[36] Security clearances are the government's assessment of the Applicant's security. In *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 at para. 12 the Federal Court of Appeal stated:

> … none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they themselves observed. In my view not other reasonable interpretation is possible, either of this paragraph or of the pacts, and therefore para. 20(1)(b) is irrelevant in the cases at bar. (emphasis added)

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[37] The security clearances in question were provided by the government to the Applicant. The process by which the Applicant informed PWGSC of its security clearance status does not change the source of the security clearances is the government itself. At best, the Applicant's provision of information about security clearance status merely confirms the government assessed its security.

[38] I conclude the information about the Applicant's security clearances is not confidential commercial information supplied by a third party to the government therefore subsection 20(1)(b) of the *Act* does not apply to exempt this information from disclosure.

[39] The Applicant submits the records contain information that is exempt from disclosure pursuant to subsections 20(1)(c) and (d) of the *Act* on the basis that release of the records will cause material financial loss, prejudice the Applicant's competitive position and interfere with contractual negotiations.

[40] Subsection 20(1)(c) exempts the disclosure of information which could reasonably be expected to result in material financial loss or gain or could reasonably be expected to prejudice the competitive position of a third party. The Applicant states it provides maritime aerial surveillance services and processes sensitive information to other clients. It believes it is reasonably probable that disclosure of the records will damage the Applicant's good will and reputation in the industry of maritime aerial surveillance causing prejudice to its competitive position and material financial loss.

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[41] The Applicant also submits disclosure of its security status and information in the records will identify the Applicant as a target for infiltration. It argues disclosure would inform potential threats of the type of sensitive information it deals with. Moreover, the information it alleges is inaccurate would adversely affect the Applicant's reputation with its clients and potential clients.

[42] The Applicant's submissions concerning the prospect of infiltration are entirely speculative. The Applicant bears the burden of proving the information comes within subsection 20(1)(c). The Respondent points out that the Applicant publicizes its business on its website including that its DFO Air Surveillance Program benefits DFO, the Coast Guard, DND, the RCMP and the Canadian Border Services Agency. In my view the release of the impugned information would not add to any greater risk of infiltration for the Applicant than it must already face given the nature of its business.

[43] Moreover, my review of the impugned record does not support the negative interpretation the Applicant puts upon it. The Applicant necessarily deals with a sophisticated clientele who are not likely to misinterpret the information about which the Applicant has expressed concern.

[44] I conclude the Applicant has not met its burden of establishing the disclosure of information would reasonably be expected to prejudice its competitive position to a degree warranting the exception in 20(1)(c).

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[45] Finally, the Applicant submits any suggestion it is not compliant with contractual requirements, or in the past, has not been compliant with requisite security status clearances, could obstruct the awarding of a new DFO contract or other new contracts.

[46] The simple answer to this last objection is that the government had in hand the information in question and that information did not interfere with the Applicant's success in securing the renewal of its contract. The Applicant does not offer any evidence to support that the information would interfere with post contract award negotiations on implementation of the contract.

[47] I find the Applicant has not demonstrated a reason for exception to disclosure under subsection 20(1)(d).

CONCLUSION

[48] The application under section 44 of the *Act* is dismissed with costs in favour of the Respondent.

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JUDGMENT

THIS COURT ADJUDGES AND ORDERS that

1. the application under section 44 of the *Access to Information Act* is dismissed;
2. this Judgment and Reasons for Judgment is communicated to the parties and not published until the period for appeal is elapsed and no application for appeal is made; and
3. costs are awarded in favour of the Respondent.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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