Federal Court  Cour fédérale

Date: 20131220

Docket: T-737-11

Citation: 2013 FC 1282

Ottawa, Ontario, December 20, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MOHAMED ZEKI MAHJOUB

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 41 of the *Privacy Act*, RSC 1985, c P-21 [the Act and the Privacy Act] of a decision of the Canada Border Services Agency [CBSA], dated March 12, 2010, denying the Applicant's request for the release and communication of telephone conversations intercepted following his release from detention for the period between April 11, 2007 and May 12, 2008. This decision was reviewed by the Privacy Commissioner as a result of a complaint filed against the March 12, 2010 decision. The Privacy Commissioner

concluded in a decision dated March 8, 2011 that the exemptions claimed (under paragraph 22(1)(*b*) and section 26 of the *Privacy Act*) were valid.

I. Facts and decision under review

[2] The Applicant was granted refugee protection in 1996. From June 2000 to February 2007, he was detained under a security certificate, which was cancelled as a result of a decision of the Supreme Court of Canada in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 140, [2007] 1 SCR 350 in which the security certificate regime was declared invalid. Following the 2008 amendments to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], a new certificate was issued against the Applicant which was recently found to be reasonable (see Justice Blanchard's Reasons for Judgment and Judgment in 2013 FC 1092 [*Mahjoub*, 2013 FC 1092]). On February 15, 2007, the Applicant was released from detention under a number of terms and conditions (see *Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2007 FC 171, 61 Imm LR (3d) 1 [*Mahjoub*, 2007 FC 171]). One of these conditions was for the Applicant and the other users of the house telephone, namely his wife and stepson, to give consent to the interception of all their telephone and written communications. The Applicant as well as the adult members of his household consented to these interceptions.

[3] On or about May 12, 2008, a former counsel for the Applicant requested that the CBSA give him access to three categories of documents: "1) all intercepted conversations from April 11, 2007 to present, 2) intercepted mail from April 11, 2007 to present (May 12, 2008), and 3) all recordings including medical records, surveillance reports, incidents, memos of CBSA from April 11, 2007 to present (May 12, 2008)."

[4] In a letter dated May 28, 2008, the CBSA acknowledged receipt of the above-mentioned request and sought an extension of time, on or about June 10, 2008, for the processing of said request.

[5] In December 2008, it was revealed that the CBSA through its agent, the Canadian Security Intelligence Service [CSIS], had been intercepting the Applicant's solicitor-client communications, and a Court Order dated December 19, 2008 called for the interceptions to end immediately. The terms and conditions of release were amended to correct this situation.

[6] By way of written correspondence dated September 30, 2009, Mr. Pierre Tessier, the CBSA's Access to Information and Privacy and Disclosure Policy Manager, notified that the processing of the request was complete and that the last two categories mentioned above, i.e. intercepted mail and all recordings including medical and surveillance reports, incidents, etc. from April 11, 2007 to present, were to be released but not the intercepted conversations. Mr. Tessier advised that some of the requested information had been exempted from disclosure pursuant to paragraphs 19(1)(*a*), 19(1)(*b*), 22(1)(*a*), 22(1)(*b*), 70(1)(*a*), 70(1)(*b*), 70(1)(*c*), 70(1)(*d*), 70(1)(*e*) and 70(1)(*f*) and sections 20, 21, 26 and 27 of the Act.

[7] On February 10, 2010, former counsel for the Applicant wrote to Mr. Tessier to inform him that the documents delivered are insufficient as they do not include any intercepted conversations, either transcribed or on CD-ROM […]. "Pointedly, the documents do not contain the intercepted solicitor-client conversations." Counsel then asked for the CBSA to communicate […] "the intercepted calls in CD format or any other format."

[8] On March 12, 2010, Mr. Tessier responded that all intercepted conversations were withheld pursuant to paragraph 22(1)(*b*) and section 26 of the Act. Following this, on April 7, 2010, the Applicant filed a complaint to the Office of the Privacy Commissioner of Canada [OPC] contesting the CBSA's refusal of March 12, 2010 to communicate the intercepts of their conversations. Counsel also said that it was not asking for the release of intercepted communications of his wife and her son, but that it wanted the release of all intercepted communications involving the Applicant.

[9] An investigation took place and resulted in a report, rendered on March 8, 2011, which validated the exemptions relied upon by the CBSA (under paragraph 22(1)(*b*) and section 26 of the Act) and concluded that the complaint was not well founded.

[10] On April 28, 2011, the Applicant served and filed a Notice of Application under section 41 of the Act for a judicial review of the refusal of the CBSA dated March 12, 2010.

[11] On July 28, 2011, the Respondent served and filed an affidavit from Mr. Tessier, dated July 7, 2011, confirming that the decision is based on paragraph 22(1)(*b*) and section 26 of the Act.

[12] On June 12, 2011, the Applicant requested the communication of the material that is relevant to the application and that is in the possession of the tribunal whose decision is the subject of this application. The Respondent objected to the request on August 26, 2011.

[13] On August 29, 2011, the Applicant served and filed a written cross-examination of Mr. Tessier, and on September 28, 2011, the Respondent served and filed the answers to the written examination of Mr. Tessier.

[14] On October 28, 2011, the Applicant filed a motion to dispose of the objections raised by Mr. Tessier to his cross-examination.

[15] On November 23, 2011, the Respondent filed a motion seeking leave from this Court to file a confidential affidavit from Mr. Brett Bush of the CBSA. In support of the motion, the Respondent filed an affidavit from Mr. Tessier in which he testified at paragraph 4 that "after consulting Mr. Bush's affidavit, [he] also confirm[s] that the disclosure of the information contained therein would be injurious to national security." The Applicant opposed the Respondent's request to file the confidential affidavit of Mr. Bush.

[16] On November 28, 2011, this Court heard the Applicant's motion to dispose of the objections and the Respondent's motion to file a confidential affidavit. Prothonotary Morneau noted Mr. Tessier's assertion in his affidavit that the disclosure of information would jeopardize national security, whereas this exception was not invoked in the refusal letter dated March 12, 2010. A direction was issued, which adjourned the presentation of the motions sine die and directed that the parties should request the designation of a case management judge. The undersigned was appointed by the Chief Justice.

[17] On April 10, 2012, the Respondent filed a motion in order to add new grounds for the refusal, namely section 21 and subparagraph 22(1)(*a*)(iii) of the Act. The Applicant reiterated his objection. On July 19, 2012, the Court rendered an Order granting the Respondent's motion for permission to add new national security grounds. In the Order, the Court indicated that it will first review the decision based on the grounds previously raised by the decision-maker and will proceed to review the decision in relation to the new grounds only if the initial grounds for exemption are found to have been incorrectly raised (see the Order rendered in this docket (T-737-11) on 19 July, 2012).

[18] On October 10, 2012, this Court rendered two orders by which it granted the Respondent's motion to file a confidential affidavit by Mr. Bush for the *ex parte* and *in camera* hearing (see the Order rendered in response to the Motion of the Respondent to file a Confidential Affidavit and for an Extension of Time to file it) and dismissed the Applicant's motion to object to Mr. Tessier's answers to the cross-examination on his affidavit (see the Order rendered in response to the Objections to the answers given pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106). Mr. Bush's affidavit was filed on October 22, 2012.

[19] An *ex parte* hearing was held on January 9, 2013 to deal with Mr. Bush's affidavit. On that same day, a case management conference was held during which the Court provided counsel for the Applicant with some information as to what took place during the *ex parte* session.

[20] On January 25, 2013, the Court ordered that the Minister prepare a redacted version of Mr. Bush's affidavit. This Court was satisfied with the proposed redactions. Moreover, the Court

directed that the parties file only one record each and that they address all the exemptions. Service of the redacted affidavit was done on January 30, 2013.

[21] On February 11, 2013, the Applicant filed a motion record requesting disclosure of the redacted version of the transcript of the *ex parte, in camera* hearing of the Respondent's witness, heard by the Court on January 9, 2013 or, in the alternative, an Order for the communication to the Applicant of a detailed public summary of this hearing. On March 21, 2013, the Court dismissed this motion (see the Order rendered in this docket (T-737-11) on March 21, 2013).

[22] The public hearing of the section 41 application for the review of the March 12, 2010 decision was held on June 27, 2013. The Court raised concerns as to the possible duplication of proceedings and the re-litigation of matters already dealt with by the designated judge who presided over the certificate case involving the Applicant. It was of public knowledge that intercepted communications were released for the period in question during the certificate proceedings. Counsel for the Applicant objected to the concerns raised by the Court, whereas counsel for the Respondent agreed with them.

[23] By Order dated July 17, 2013, the Applicant was directed to file with the Court all requests, motions, decisions rendered and information provided in the certificate case concerning the intercepted communications. Afterwards, the Respondent had to review the documents, compare the certificate proceedings disclosure made with the intercepted communications retained by the CBSA and inform the Court of what was disclosed and what was not on or before September 12, 2013. Upon receipt of this information and further submissions made by the parties, the Court would then

take all the matters under reserve. The result of this exercise was that only 5 (five) solicitor-client calls had not been disclosed to the Applicant. The first conversation lasted 1 (one) minute and 21 seconds, the second conversation is inaudible according to the log and lasted 37 seconds. The third conversation was 56 seconds long, the fourth lasted 0 (zero) second and the last conversation was 1 (one) second long. Overall, out of the 4,986 conversations intercepted, 695 were identified as solicitor-client and had been disclosed to the Applicant. Therefore, this whole proceeding exists in good part for only 5 (five) unreleased conversations, 2 (two) of which have no audio while the remaining 3 (three) last less than 2 (two) minutes each. It is to be noted that the former counsel was "pointedly" interested in the release of these solicitor-client conversations (see letter dated February 10, 2010; Applicant's Record, page 26) and not the other withheld telephone conversations.

II. Applicant's submissions

[24] The Applicant argues that under the Act, accessibility to personal information is the rule and confidentiality is the exception. Exemptions should therefore be narrowly construed, and section 47 of the Act places the burden of proof on the Respondent to justify, on a balance of probabilities, the use of such exemptions.

[25] Under section 21 and paragraph 22(1)(*b*) of the Act, the Respondent must demonstrate a clear and direct link between disclosure and the harm alleged so as to justify confidentiality.

[26] Moreover, even if the Respondent demonstrates that he meets the burden described above, he is not obligated to withhold the information under sections 21 and 26 and paragraph 22(1)(*b*) of

the Act, given that, according to the Applicant, this Court can review whether the Respondent has exercised that discretion in a proper or lawful manner.

[27] The Applicant submits that in the present case, the Minister has not met and cannot meet the burden of proof of establishing, on a balance of probabilities, that the exemption of the intercepted communications is justified, and he adds that even if the retention were proven as justified, the Minister did not properly or lawfully exercise his jurisdiction.

[28] The Applicant submits that section 21, subparagraph 22(1)(*a*)(iii) and paragraph 22(1)(*b*) of the Act do not apply. The Applicant's telephone communications were intercepted following his release from detention in 2007 under stringent terms and conditions imposed by the Court and the existence of the interceptions is therefore known.

[29] Moreover, the Applicant's telephone conversations should not have been intercepted or used for any other purpose than monitoring his compliance with the terms and conditions of his release. In order to be compatible with section 8 of the *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (UK)*, 1982, c 11 [Charter], interceptions must respect the criteria outlined in *Canada (Director of Investigation & Research of the Combines Investigation Branch) v Southam Inc*., [1984] 2 SCR 145, 11 DLR (4th) 641. If the interceptions were used for any other purpose, it is submitted that they were illegal.

[30] The Applicant argues that if the interceptions are unlawful, the CBSA cannot invoke national security reasons or injury to the existence of an investigation to hide a wrongdoing, as held

by the Federal Court in *Khadr v Canada (Attorney General)*, 2008 FC 549, 77 WCB (2d) 624. The Applicant adds that it has been revealed in the context of the Applicant's security certificate case that the Respondent, through CSIS, illegally intercepted the Applicant's solicitor-client communications, thus violating his right to solicitor-client privileged communications.

[31] As indicated previously, some of the recordings of the intercepted communications have already been released to the Applicant in the context of his security certificate case, further proving that the exemptions invoked are unfounded or that the Respondent did not lawfully exercise his discretion when determining whether to disclose or not the interceptions, despite the potential application of the exemptions.

[32] Given that the interceptions were judicially authorized, that the Applicant and the adult household members had given their consent to these interceptions and that the purpose of these interceptions would have been to monitor the Applicant's compliance with the terms and conditions of his release, the Applicant submits that it cannot be said that the disclosure of the interceptions could reasonably be injurious to international affairs, national defense or the detection, prevention or suppression of subversive activities or in the case of paragraph 22(1)(*b*) of the Act, to the enforcement of Canadian legislation or the conduct of lawful investigations.

[33] For the Applicant, it is apparent that the wording of section 21, subparagraph 22(1)(*a*)(iii) and paragraph 22(1)(*b*) of the Act allow the Respondent to exercise his discretion to release the information sought even if it falls within the exemption category.

[34] The Applicant is of the view that, based on Mr. Tessier's affidavit, there is no indication that when he rendered the decision, Mr. Tessier considered the relevant factors and interests, the facts and the circumstances of this particular case such as the fact that the interceptions were made pursuant to a Court Order, that the Applicant had given his consent to these interceptions and that their primary purpose was to monitor compliance with the terms and conditions of release. The Respondent should have turned his mind to these factors when deciding to refuse to release the intercepted calls.

[35] Finally, the Applicant submits that the Respondent cannot invoke the exemption based on section 26 of the Act to refuse to disclose the intercepted conversations involving the Applicant and third parties because the Applicant participated in those conversations.

[36] With regard to the calls that would have involved the Applicant's wife or stepson, although no consent forms from these two persons were provided in the access to information request, they did provide their consent to the interception of the communications under the Court Order. The Applicant submits that this consent can be considered to extend to the disclosure request.

[37] The Applicant adds that if this Court determines that the recordings of the calls cannot be released, logs of the calls, at the very least, should be released.

III. Respondent's submissions

[38] The Respondent first submits that this Court cannot review its own Order on the availability of additional grounds and that if the Applicant had a problem with the Court Order allowing the

Minister to rely on other exemption grounds, he could have appealed it by virtue of paragraph 27(1)(*c*) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA]. Therefore, the Minister's refusal may be based on either section 21, subparagraph 22(1)(*a*)(iii), paragraph 22(1)(*b*) or section 26 of the Act.

[39] Second, the Respondent submits that the application of the exemptions is not vitiated by any reviewable error.

[40] The Respondent argues that the refusal based on section 26 of the Act is probably the simplest answer to Mr. Mahjoub's application. As established by case law, section 26 of the Act was meant to protect third parties from having confidential information revealed about them. Under subsection 8(1) of the Act, a government shall not disclose personal information without the consent of the individual to whom it relates unless it falls within one of the exceptions listed in subsection 8(2) of the Act. Only paragraph 8(2)(*m*) of the Act applies to this case, and it requires a balancing exercise. A government institution may disclose personal information in exceptional circumstances where the public interest in disclosure clearly outweighs the invasion of third parties' privacy that could result from disclosure. There is therefore broad discretion conferred upon the government institution. As established in *H.J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, 2006 SCC 13, 48 CPR (4th) 161 [*Heinz*], the purpose of the Act is to strike a careful balance between privacy rights and the right of access to information. It is clear from the Act that it affords greater protection to personal information.

[41] In the Applicant's case, no one who called the Applicant, his wife or her son has ever consented to the release of their names, telephone number and conversations. None of the people outside the Applicant's household has given consent to the interception of their conversations. Even though the Applicant, his wife or her son were party to the conversations, it does not entitle them to obtain the names of those with whom they spoke or any particulars. This is especially true for conversations in which the Applicant took no part.

[42] Furthermore, the Applicant requested access to his personal information, and that of his wife and her son, who both could have consented in writing to the release of the conversations but did not. The Applicant cannot rely on the consent his wife and her son gave to the interception in the certificate proceedings. It does not make sense to file a distinct application against the refusal to disclose, but nevertheless rely on the certificate proceeding in which the Applicant could have filed a motion, similar to the one or those he presented in the past, to obtain the same information. An access to personal information is not to be confused with a certificate proceeding.

[43] The Respondent further submits that *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 29, [2002] 2 SCR 773 [*Lavigne*], stands for the proposition that when section 26 of the Act applies, which is the case, the institution is statutorily obliged to refuse to release personal information.

[44] With regards to the refusal based on section 21, subparagraph 22(1)(*a*)(iii) and paragraph 22(1)(*b*) of the Act, the Respondent submits that it is also justified as the *ex parte* evidence provides valid evidentiary basis for those exemption grounds. In the case at bar, unlike in

Lavigne, above, where all the investigations had been concluded by the time disclosure of personal information in question was requested, investigations are still ongoing. Subsection 22(3) of the Act, which defines the word "investigation," has a broad meaning and may refer equally to investigations that are underway, are about to commence, or will take place (see *Lavigne*, above, at paras 52, 54 to 55).

[45] For the purposes of this instance, these provisions may be encapsulated as being the "national security exemption." The fact that this Court ordered the interceptions of the conversations as part of the conditions of Mr. Mahjoub's release shows that he posed, at the time, a threat to national security. This assessment is supplemented by the *ex parte* evidence which indicates a continued potential risk to national security and ongoing lawful investigations in the form of a continuous monitoring of the Applicant's and his family's telephone conversations specifically.

[46] The Respondent finally submits having exercised his discretion in a reasonable manner, compatible with the objectives of the Act and accordingly with the relevant legal principles. Mr. Tessier refused to disclose the conversations on the basis that doing so could reasonably be expected to be injurious to the enforcement of Canadian legislation or the conduct of lawful investigations and that the information not disclosed relates to the existence or nature of a particular investigation and was obtained or prepared in the course of an investigation. The fact that Mr. Tessier released some pieces of information and refused to disclose others is telling. In other words, that injury tipped the balance in favour of refusing to disclose the intercepted conversations, which means that he considered the potential damage of releasing it.

[47] The Respondent argues that Mr. Tessier exercised his discretion in a way that was compatible with the relevant legal principles and the objectives of the Act, which include protecting the privacy of individuals with respect to personal information about themselves held by a federal government institution, providing individuals with a right of access to that information and protecting governmental interests by providing for exemptions to the general principle favouring disclosure.

[48] The evidence, including Mr. Tessier's and Mr. Bush's affidavits, shows that there were serious national security concerns which justified the refusal for disclosure. The Respondent submits that there is no public interest more important than national security, as stated by the Federal Court of Appeal in *Goguen v Gibson* (1984), 40 CPC 295, 3 Admin LR 225 (FCA) and more recently in *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at paras 24 to 29, [2002] 4 SCR 3.

[49] Furthermore, the Respondent submits that where section 21 or paragraph 22(1)(*b*) of the Act applies, the government institution is subject to the lower standard of proof of "reasonable grounds on which to refuse to disclose the information." This, along with the discretionary exemptions created by section 21 and subparagraph 22(1)(*a*)(iii) of the Act, is yet another clear indication that the importance of national security is such that more latitude is afforded to the government institution, and not to the Court, to decide whether disclosure of personal information would endanger national security.

IV. Points at issue

1. Does the section 26 exemption of the Act relied upon by the Respondent constitute a valid basis for the refusal to disclose the intercepted communications?

2. Does the paragraph 22(1)(*b*) exemption of the Act relied upon by the Respondent constitute a valid basis for the refusal to disclose the intercepted communications?

3. In case of a positive finding with respect to either or both of the two first issues, has the discretion been exercised pursuant to the Act?

4. In case of a negative finding for any of the three (3) previous issues, do the section 21 and subparagraph 22(1)(*a*)(iii) exemptions of the Act relied upon posteriously by the Respondent constitute a valid basis for the refusal to disclose the intercepted conversations?

[50] As it will be found, most of the intercepted conversations were validly withheld from disclosure pursuant to section 26 and paragraph 22(1)(*b*) of the Act and the exercise of discretion was done reasonably. As for the five (5) intercepted conversations remaining involving the Applicant and his counsel, they are not subject to any exemptions because they are communications which are protected by the solicitor-client privilege and no exemptions can justify their non-disclosure. Therefore, there will be no need to address the fourth issue in the present matter.

V. The standard of review

[51] The standard of review applicable to the present case is that the Court must first decide whether or not the non-disclosed requested information falls within one of the exemptions from disclosure provided for by the *Privacy Act*. Such a determination is a question of law which calls for the review to be made on a correctness standard (see *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, at para 98 [*Leahy*]). If the exemption on which the non-disclosure is based calls for an exercise of discretion, the review of this exercise shall be assessed on a reasonableness standard (see *Leahy*, above, at para 99). As noted by the Federal Court of Appeal, this type of discretion is fact-based and has a policy component. Deference must be shown.

VI. Analysis

A. The requirements of the *Privacy Act*

[52] The *Privacy Act* recognizes that a Canadian citizen or a permanent resident (as defined by the IRPA) has a right to access, upon request, to personal information that concerns him or her (see section 2 and subsection 12(1) of the Act). By virtue of the *Privacy Act Extension Order, No 2*, SOR/89-206, the right of access under subsection 12(1) of the Act was extended to all present in Canada.

[53] For the person seeking disclosure related to him or her, the general rule calls for the disclosure upon request, while the exception is for the decision-maker to rely on exemption(s) from disclosure provided for by the *Privacy Act*.

[54] As noted above, the CBSA initially relied on the following exemptions to justify the non-disclosure of the intercepted conversations: that the release of the information could reasonably cause injury to the enforcement of Canadian legislation or the conduct of lawful investigations (paragraph 22(1)(*b*) of the Act) and that the release of the information could disclose information on individuals other than the Applicant (section 26 of the Act). Other national security exemptions were added in the course of the present proceedings. Again, as noted above, this Court decided on July 19, 2012 to grant leave to the Respondent, allowing the addition of national security grounds: that the disclosure of the information could reasonably be expected to be injurious to international affairs, the defense of Canada or to the detection, prevention or suppression of the subversive activities (section 21 of the Act) or that the disclosure of the information was collected in the course of lawful investigations pertaining to activities suspected of constituting threats to the security of Canada as defined in the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 at para 2 (subparagraph 22(1)(*a*)(iii) of the *Privacy Act*).

[55] As part of the July 19, 2012 Order, this Court stated that it would first deal with the initial exemptions claimed and then turn, should these grounds not be applicable, to the newly added national security exemptions.

[56] The burden to establish the applicability of the exemptions submitted in support of the non-disclosure rests with the government institution, in the present case, the CBSA (see *Lavigne*, above, at para 31).

[57] As for the exercise of discretion, provided that the exemption(s) are validly claimed, the burden of proof is on the CBSA to show that it was exercised in a reasonable manner. After all, the Applicant, having been only a participant to some of the intercepted communications, is not aware of all the information being retained, such as that involving his wife and her son. Furthermore, counsel for the Applicant neither participated in the *ex parte* hearing nor was he given access to the full affidavit in support of the national security claim or the exhibits filed (see *Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 at paras 36 to 39). Such was the situation in the present proceedings; therefore, it would be unfair to impose a burden of proof on a party that does not have all the information that the other party has. Consequently, the Respondent has the burden to show that the exercise of discretion was reasonable. I note that the Respondent has agreed to this in its written submissions at para 40.

[58] In order to establish the reasonableness of the exercise of discretion, the evidence must be such that it shows consistency with the purpose of the Act and, therefore, that some consideration was given to the possibilities of considering release with the exemption(s) in mind and, if applicable, to the injury that disclosure may cause and other relevant factors (see *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815, at para 48 and *Attaran*, above, at para 17).

[59] Before closing this part, it is not the intention of this Court to review its Order of July 19, 2012, discussed above. The submissions of the Applicant are ambiguous in that regard. For the sake of clarity, the Order stands: the Applicant did not appeal it as he could have done pursuant to paragraph 27(1)(*c*) of the FCA, and it would be inappropriate for this Court to proceed as if it did

not exist. Therefore, the CBSA's decision to not disclose the intercepted telephone conversations can be based on one of the following exemptions:

i) Information concerning individuals other than the Applicant (section 26 of the *Privacy Act*).

ii) Injury to the enforcement of Canadian legislation or the conduct of lawful investigations (paragraph 22(1)(*b*) of the *Privacy Act*).

iii) Injury to International Affairs, the defense of Canada or to the detection, prevention of subversive activities (section 21 of the *Privacy Act*).

iv) Information sought is information collected in the course of lawful investigations pertaining to activities suspected of constituting threats to the security of Canada (subparagraph 22(1)(*a*)(iii) of the *Privacy Act*).

[60] As it was said earlier, it will not be necessary to address the national security exemption, and the following analysis will deal with the exemptions claimed pursuant to section 26 and paragraph 22(1)(*b*) of the *Privacy Act*.

B. Is the section 26 exemption of the Act a valid basis to justify the non-disclosure of the intercepted communications?

[61] Without disclosing content, it is known to the parties that the information retained can be classified as follows:

i) Telephone conversations involving the wife of the Applicant and her son with unknown persons. The wife and her son have not consented to the release of this information.

ii) Telephone conversations involving the Applicant with unknown persons who have not consented to the release of their conversations with the Applicant.

iii) Telephone conversations involving the Applicant with his lawyers, conversations which were found to be for the time period in question protected by the solicitor-client privilege by the certificate judge (see Justice Blanchard's Reasons for Order and Order in 2013 FC 1095, at paras 207 and 221, [2013] FCJ No 1216 [*Mahjoub (Re)*, 2013 FC 1095]).

[62] As previously mentioned, in order to facilitate the understanding of the remaining analysis, the section 26 privacy interest protected by the *Privacy Act* will deal with the first two categories. The third one, as argued by counsel for the Applicant, entails an issue of impropriety and the illegality of going through with these interceptions, and so it raises the following question: Can information protected by the solicitor-client privilege be kept from disclosure based on one of the two exemptions (under section 26 and paragraph 22(1)(*b*) of the Act) claimed by the Respondent?

[63] The Supreme Court of Canada in *Heinz*, above, at paras 21 to 31, has made it abundantly clear that "[...] the right to privacy is paramount over the right of access to information." It is also said that greater protection is given to the privacy right (i.e. personal information) than to the right of access.

[64] Section 26 of the *Privacy Act* reads as follows:

Privacy Act, RSC, 1985, c P-21	*Loi sur la protection des renseignements personnels*, LRC, 1985, ch P-21
Information about another individual	Renseignements concernant un autre individu
26. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.	**26.** Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.

Section 26 of the Act was meant to protect third parties from having confidential information revealed about them and subparagraph 8(2)(*m*)(i) inserted a balancing between the public interest in disclosure and the right to privacy (see *Ruby v Canada (Solicitor General)*, [2000] 3 FC 589, at para 121).

[65] If disclosure is prohibited pursuant to section 8 of the *Privacy Act*, section 26 makes it clear that the decision-maker "shall" refuse to disclose it (see *Lavigne*, above, at para 29).

[66] The public evidence reveals that as part of his conditions of release, Mr. Mahjoub, his wife and her son consented that all telephone calls from the household phone could be intercepted and recorded by the CBSA. Responding to a written question from the Applicant, Mr. Tessier informed that the only consent received by the CBSA in relation to the Applicant's request under the *Privacy*

Act was from the Applicant himself (see also Access Request dated May 12, 2008 where former counsel includes only the consent of the Applicant).

[67] By reading the conditions of release contained in *Mahjoub*, 2007 FC 171, above, dated February 15, 2007, one can notice that the intercepted communications were part of a totality of conditions designed to ensure that the danger identified to Mr. Mahjoub would be neutralized (see *Mahjoub*, 2007 FC 171, above, at para 158). These communications were intercepted to ensure the monitoring of the Applicant's activities so that nothing could be done to facilitate "[…] any threat or danger posed by Mr. Mahjoub's release." Without his wife's and her son's consents to the interception of telephone conversation, there would not have been a release from detention of the Applicant.

[68] During these proceedings, this Court did inquire with counsel for the Applicant if his wife and her son had consented or would give consent to the disclosure request of the Applicant of the intercepted communications involving her and her son. The response given after verification was that no consent was or would be given.

[69] The conversations of his wife and her son with others are personal information under the *Privacy Act*. It is information that relates to their respective lives, their contacts and the show of their personal needs, wishes, feelings, depending on the interlocutors. The Applicant has no right of access to their personal information. Section 26 of the Act makes that clear.

[70] The fact that the intercepted communications were judicially ordered and that consents were given at the time of release does not render this personal information public for Mr. Mahjoub's purposes. The consents given by the wife and her son were not for Mr. Mahjoub to have access to their personal information, but they were rather made for the CBSA in order to allow the Applicant's release from detention.

[71] In his written submissions, the Applicant only argued that the consents given by his wife and her son under the conditions of release should be considered as extending to the Applicant's disclosure request. For the reasons given above, this argument cannot be accepted. Nothing else was submitted concerning section 8 and subsection 8(2) of the Act.

[72] Therefore, the exemption under section 26 to justify the non-disclosure of the intercepted communications involving the Applicant's wife and her son were correctly relied upon subject to the subparagraphs 8(2)(*m*)(i) and (ii) of the Act, dealing with the discretion to exercise, which shall be discussed later.

[73] As for the second category of interceptions involving Mr. Mahjoub with third parties, the Applicant simply argues that the intercepted conversations involving him with others should be disclosed even though no consent was given by his interlocutors.

[74] He submits that as a participant to these conversations, he should be granted access to these intercepted communications. In response to this, the Respondent suggests that since no consent was

given by the interlocutors, this does not entitle him to obtain the intercepted communications. Nothing else was said and no jurisprudence was submitted to support the Applicant's submission.

[75] These intercepted communications involving Mr. Mahjoub with interlocutors constitute, as it concerns the Applicant, personal information under section 12 of the Act, and if such is the case for him – as it is – this information must necessarily also be personal with respect to his interlocutors under section 26 of the Act. This protection cannot only benefit Mr. Mahjoub to the exclusion of his interlocutors. Mr. Mahjoub might have a right to access such information, but his interlocutors benefit from the protection of their privacy, as they have a right to withhold from public disclosure the fact that they spoke to him and what was said during these conversations. On that basis, the section 26 exemption was correctly relied upon by the Respondent. Pursuant to section 48 of the *Privacy Act*, I have considered releasing the content of the conversations but without references to the names and phone numbers of the interlocutors. This raises the following problems: the conservations may disclose indirectly the identification of the interlocutors depending on the use that Mr. Mahjoub may do with them, and for the reasons to follow, these conversations are subjected to the exemption found in paragraph 22(1)(*b*) of the *Privacy Act*. In any event, the Applicant did not suggest that this was an alternative to follow.

[76] No consent was given by any of the interlocutors. Therefore, this information is to be protected from disclosure subject to the discretion contained in subparagraphs 8(2)(*m*)(i) and (ii) of the *Privacy Act* which will be discussed later.

[77] As for the third category of the interceptions, conversations between Mr. Majhoub and his counsel raise a different set of issues.

[78] A bit of factual history is important. The intercepted communications procedure for this period began after his release from detention in 2007 under the first certificate procedure. While Mr. Mahjoub was in detention, Justice Blanchard found that no interceptions were actualized (see *Mahjoub (Re)*, 2013 FC 1095, above, at para 204). At the time of his release, Mr. Mahjoub was subjected to strict conditions. In the fall of 2008, during the second certificate procedure, it became known that all conversations involving the Applicant with his counsel were intercepted and, to a limited extent, listened to. In December 2008, the matter was referred to the designated judge, the late Madam Justice Layden-Stevenson. An *ex parte*, *in camera* hearing was held on the matter, a witness was questioned, arguments were submitted with the involvement of public counsel, and based on the release of a summary of evidence of the *in camera* hearing, an Order was issued December 19, 2008 (see Madam Justice Layden-Stevenson's Order rendered in docket DES-7-08), which amended the conditions of release of April 11, 2007 to specify that when conversations of the Applicant with counsel occurred, monitoring had to stop, and that the recorded conversations, if any, had to be deleted. (See also communication from the Court to Mr. Mahjoub and counsel of December 18, 2008 with Appendix A.)

[79] The December 18, 2008 summary of evidence had this to say on the matter:

> All intercepted communications, including solicitor-client communications, if any, to the extent of being satisfied that the communication does not involve a potential breach of the terms of release or a threat to national security, were monitored (paragraph 11).

[80] As part of the certificate procedure, in an Order dated January 20, 2011, Madam Justice Mactavish, although partly rejecting Mr. Mahjoub's request to access documents that the Ministers claimed as solicitor-client and litigation privilege, did conclude that the interception of the solicitor-client telephone conversations showed "[…] *prima facie* actionable misconduct by the Ministers in relation to these proceedings." (See Madam Justice Mactavish's Order rendered on January 20, 2011 in docket DES-7-08, at page 10.)

[81] In *Mahjoub (Re)*, 2013 FC 1095, above, with respect to Mr. Mahjoub's two motions for a permanent stay of proceedings based on violations of the Charter and abuse of the Court's process, Justice Blanchard dealt with the interception of conversations between the Applicant and his counsel for the period between June 14, 2007 (at the time of release from detention) and December 19, 2008 which covers the period for the access request (from April 11, 2007 to May 12, 2008). As noted earlier, Justice Blanchard found that, while Mr. Mahjoub had been in detention (from April 11, 2007 to June 14, 2007) there had been no interception of communications (see *Mahjoub (Re)*, 2013 FC 1095, above, at para 204).

[82] As seen earlier, in *Mahjoub (Re)*, 2013 FC 1095, above, at paras 207 and 221, Justice Blanchard concluded that the intercepted calls involving counsel with the Applicant were protected by the solicitor-client privilege and that listening to them, even partially, constituted a breach of this privilege. It is not the intention of this Court to conclude otherwise since the certificate judge had all the evidence to decide on this issue. In the present proceedings, counsel for the Respondent did not suggest that the conversations were not protected by a solicitor-client privilege and he did not

address the three criteria to establish solicitor-client privilege, as defined in *Solosky v Her Majesty the Queen*, [1980] 1 SCR 821 at para 837.

[83] As a matter of fact, counsel for the Respondent qualified the five (5) intercepted communications that have not been disclosed as being "[…] five (5) solicitor-client conversations" in their letter to the Court dated October 3, 2013. Therefore, I find them to be five (5) solicitor-client conversations.

[84] As noted earlier, during the certificate proceedings, Mr. Mahjoub had already received the communication of 695 solicitor-client conversations as a result of different requests. Even the logs of the intercepted solicitor-client conversations were disclosed to the Applicant on December 22, 2010 (see *Mahjoub (Re)*, 2013 FC 1095, above, at paras 423 to 426).

[85] Therefore, I have to take notice that a finding of a *prima facie* actionable misconduct by the Ministers was made by a judge of this Court concerning the interception of telephone conversations of the Applicant with his counsel and that the certificate judge found that by listening to some of these conversations, the solicitor-client privilege was breached.

[86] In such a case, how can the paragraph 22(1)(*b*) and section 26 exemptions under the *Privacy Act* be used to protect from disclosure the five (5) remaining solicitor-client conversations?

[87] It is recognized that national security exemptions cannot be used to protect information that, if disclosed, would be embarrassing or expose a wrongdoing (see *Canada (Attorney General) v*

Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar – O'Connor Commission), 2007 FC 766, [2007] FCJ No 1081 [*Arar*] at para 60 and *Khadr v Canada (Attorney General)*, 2008 FC 549, at paras 86 to 89). I consider that in the present proceeding, the above principle applicable to national security exemptions also applies to the section 26 and paragraph 22(1)(*b*) exemptions involving the Applicant and the telephone conversations with his counsel.

[88] Therefore, I find that such a breach of the solicitor-client privilege cannot be saved by the section 26 or paragraph 22(1)(*b*) exemptions under the *Privacy Act*.

[89] As such, the Respondent shall release to the Applicant the 5 (five) remaining recorded conversations involving the Applicant and his counsel.

C. Is paragraph 22(1)(*b*) of the *Privacy Act* a valid basis to justify non-disclosure?

[90] The Applicant does not submit that the interception of the calls was not done as part of an investigation. It is his submission that it was judicially authorized with consent from the household members and that the purpose was to monitor compliance with the terms and conditions of release and that, therefore, it cannot be expected to be injurious to international affairs, national defence or anything related to subversive activities or in the case of paragraph 22(1)(*b*) of the Act to the enforcement of any Canadian law or the conduct of lawful investigations.

[91] Subsection 22(3) of the *Privacy Act* defines investigation. The jurisprudence has given it a large sense. It can be past, present and future investigations, and even an investigative process in

general (see *Lavigne*, above, at para 52). The word investigation has a broad meaning which covers the role of both the Security Intelligence Review Committee (SIRC) and the CBSA in ensuring that the Applicant complies with the conditions of release so that they neutralize the danger to which he was associated by the certificate judge (see *Mahjoub*, 2013 FC 1092, above, at para 673).

[92] This responsibility attributed to the enforcement agencies by the certificate judge cannot simply be limited, as desired by the Applicant, to the role of a collector of information for the purposes of validating that the conditions of release are being complied with. Know-how, experience and investigatory means are essential components that permit the Agencies to do such tasks.

[93] For the agencies involved, the content of investigations is as important as the tools used for investigating. Content as it was collected is useful for ongoing investigations but also for future use depending on the requirements of the time of any investigations that may be called for in order to ensure that the conditions of release are respected and also that the danger associated to the Applicant remains neutralized.

[94] As mentioned earlier, the certificate issued against the Applicant has been found to be reasonable, and conditions of release still exist, although to a lesser degree, and it is still the opinion of the certificate judge that he remains a danger (see Justice Blanchard's Reasons for Order in *Mahjoub (Re)*, 2013 FC 10, at para 61, [2013] FCJ No 77).

[95] The Applicant argued that the interceptions were solely made for the purpose of verifying the terms and conditions of release. As mentioned in the preceding paragraphs, this limited scope does not take in consideration that the Applicant was and remains associated to a danger. In order to assess this danger, an ongoing investigation is called for. There was a judicial authorization to intercept the telephone conversations to allow the Applicant's release from detention. To that end, telephone calls were intercepted and kept. The Applicant did summarily make a reference to section 8 of the Charter but did not develop this argument further. It is not the intention of this Court to deal at length with this argument except to say that the interceptions of the telephone calls were judicially authorized and consented to by the Applicant, his wife and her son. The interceptions were part of an ongoing investigation of the Applicant because he was and still is associated to a danger, and the terms and conditions of release (which included the interception of calls) were designed to neutralize that danger. Compliance to the terms and conditions of release were essential to ensure the neutrality of the danger associated to the Applicant.

[96] Therefore, the intercepted calls are part of an investigation that is subject to the exception of the law enforcement and investigation provision contained in paragraph 22(1)(*b*) of the *Privacy Act*. The following part shall deal with the discretion given to the decision-maker never to assess the injury to any laws or investigations resulting from disclosure.

D. If the answer to the 3 (three) precedent issues is that both exemptions are validly claimed, has the discretion associated to each one of them been exercised?

[97] In order to be properly relied upon, all these exemptions call for the exercise of discretion. In the case of the exemption under section 26 of the *Privacy Act* (information about another

individual), paragraph 8(2)(*m*) of the Act requires that balance be struck between the public interest in disclosure and any invasion of privacy if disclosure occurs, and further requires that such disclosure should benefit the individual to whom the information relates. For the paragraph 22(*b*) exemptions, the statute requires that there must be a reasonable expectation of injury to any law of Canada or lawful investigations.

[98] In his written submissions, the Applicant does not discuss the discretion related to the section 26 exemption of the Act. The record does not indicate if at any time the Applicant submitted anything that would relate to that balancing of the public interest in disclosure versus the detriment caused by an invasion of privacy or, as a matter of fact, anything showing a benefit for the person to whom the information relates.

[99] As suggested by the Respondent, Mr. Tessier has released, to the satisfaction of the Applicant, the intercepted mail and recordings including medical reports, surveillance reports, incidents, memos of CBSA, etc. [...] As the record shows, the disclosure was substantial and voluminous (see Applicant's counsel's letter of February 10, 2010, Applicant's Record at pages 26, 27).

[100] This exercise in disclosure shows that Mr. Tessier considered the disclosure to be made and had to assess any injury or damage should some documents be disclosed and not others. This can only explain why some documents and not others could be released. An exercise of discretion had to be done, and I find that it was done in this case. His affidavit of July 7, 2011 at paragraph 6, although it repeats some of the vocabulary of the exemption sections of the statute, actually supports

such a finding. As suggested in *Leahy*, above, at para 134, the minimum required to demonstrate the exercise of discretion is to show that the decision-maker was aware of the discretion to be exercised:

> **[134]** At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.

I am satisfied that Mr. Tessier was, at a minimum, aware of the discretion to be exercised.

[101] A reviewing Court, in such a situation, must ask itself whether or not the exercise of discretion is inconsistent with the *Privacy Act*'s principles and purposes and also if its exercise is reasonable (see *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108, at para 43). The protection of information concerning his wife, his stepson and telephone interlocutors is information that the *Privacy Act*'s principles and objectives seek to protect, and the section 26 exemption validly relied upon needs to have its full effect in this case. I do not see any public interest in disclosing the information to the detriment of privacy, and I note that only the private interest of the Applicant is at play and that he alone would benefit from such disclosure. This is not what the *Privacy Act* calls for. The exercise of discretion, although succinct, as shown above is reasonable. Therefore, the use of the section 26 exemption was correct, and, as such, the information sought was justifiably not disclosed and the discretion reasonably exercised.

[102] As for the discretion associated to a reasonable expectation of injury to the enforcement of any law of Canada or to the conduct of any lawful investigation under the paragraph 22(1)(*b*) exemption of the *Privacy Act*, the precedent reasons again show that an assessment was done in

order to disclose some information but not others. Coming to such a conclusion indicates that a discretion must have been exercised in order to assess the injury. Otherwise, why would some documents be disclosed and not others? Such conclusion calls for the exercise of a reasonable expectation of injury.

[103] As mentioned earlier, Mr. Tessier affirms in his February 2012 affidavit that he did not disclose the information given or the detailed reasons for that non-disclosure because he was of the view that doing so could reasonably be expected to be injurious to the enforcement of Canadian legislation or the conduct of lawful investigations which relates to the existence or nature of a particular investigation and was obtained or prepared in the course of an investigation. Therefore, I find that, at a minimum, Mr. Tessier was aware of the discretion to be exercised but also that, taking everything in consideration, the discretion was effectively and reasonably exercised in the circumstances. Therefore, the use of the paragraph 22(1)(*b*) exemption was correct, and, as such, the exercise of discretion was reasonable and the information sought should not be disclosed to the Applicant.

[104] In conclusion, I find that both the section 26 and paragraph 22(1)(*b*) exemptions were validly claimed. Furthermore, I find that the discretion was effectively exercised with respect to both exemptions and reasonably so. Of course, these findings exclude the fact that I have also determined that the five (5) remaining communications between the Applicant and his counsel must be disclosed for the reasons mentioned above.

[105] Since I have come to this conclusion, it is not necessary to deal with the national security exemption (section 21 and subparagraph 22(1)(*a*)(iii) of the *Privacy Act*).

[106] As for costs, I note that both parties are claiming them. This procedure, although not directly related to the certificate immigration procedure, has its roots in facts and circumstances related to it. As counsel know, in immigration procedures, the granting of costs is very exceptional (see *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22).

[107] For the reasons mentioned in the foregoing paragraph, but also considering the limited mix result to which I have arrived as well as Rule 400 of the *Federal Courts Rules*, I will not grant costs to any of the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the March 12, 2010 decision is granted in part.

2. The Respondent shall disclose to the Applicant only the five (5) telephone conversations involving the Applicant with his counsel as described in paragraph 22 in the form of a CD-ROM.

3. The exemptions pursuant to sections 26 and 22(1)(*b*) of the *Privacy Act* relied upon by the Respondent for the remaining non-disclosed telephone communications are found to be valid.

4. No costs shall be granted.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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