

Federal Court



Cour fédérale

**Date: 20160321**

**Docket: T-5-15**

**Citation: 2016 FC 339**

**Ottawa, Ontario, March 21, 2016**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**BREWSTER INC.**

**Applicant**

**and**

**THE MINISTER OF THE ENVIRONMENT,  
AS THE MINISTER RESPONSIBLE FOR  
PARKS CANADA AND THE ATTORNEY  
GENERAL OF CANADA AND THE  
INFORMATION COMMISSIONER OF  
CANADA**

**Respondents**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application by Brewster Inc. [Brewster] for a review of the decision by Parks Canada to disclose certain records [Records] related to the approval of Brewster's Glacier

Discovery Walk [GDW] in Jasper National Park. The review is conducted pursuant to s 44 of the *Access to Information Act*, RSC 1985, c A-1 [Act]:

**44 (1)** Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

**(2)** The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

**(3)** Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

**44 (1)** Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

**(2)** Le responsable d'une institution fédérale qui a donné avis de communication totale ou partielle d'un document en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1) est tenu, sur réception d'un avis de recours en révision de cette décision, d'en aviser par écrit la personne qui avait demandé communication du document.

**(3)** La personne qui est avisée conformément au paragraphe (2) peut comparaître comme partie à l'instance.

[2] Although the parties have narrowed the documents in dispute, the conclusion of this Court is that only those documents with some personal information are exempt from disclosure.

Should there be any dispute as to what information is now to be disclosed or which Records are to be redacted, the parties may seek the Court's Direction.

## II. Background

[3] Brewster was founded in 1892 and has been operating in Banff and Jasper National Parks for 120 years. It has operated as a guide company in the Icefields Parkway in Jasper National Park since the 1930s and has, since 1996, operated the Glacier Discovery Centre near the Icefields Parkway.

[4] In late 2010 Brewster applied for the rights to build and operate GDW, located approximately 6.5 kilometres north of the Glacier Discovery Centre.

This approval was granted after a significant process of consultation with Parks Canada.

[5] On January 17, 2011, the public was notified that an environmental assessment would occur in relation to the GDW pursuant to the *Canadian Environmental Assessment Act*, SC 1992 c 37 (since repealed). That assessment process consisted of a three-week review and comment period commencing in November 2011.

[6] By February 2012, the GDW project was approved and a program was implemented to verify the accuracy of the assessment and to determine the effectiveness of measures taken to mitigate adverse effects. Further, an annual wildlife impact study was developed and implemented, to continue yearly for three years.

[7] Parks Canada reviewed an access to information request for a variety of communications surrounding the GDW proposal and approval process.

[8] Parks Canada sent Brewster a Third Party Notice letter pursuant to s 28 of the Act, inviting Brewster to make submissions as to non-disclosure of the records requested. The notice letter contained 1,600 pages of documents.

Brewster requested an extension of time to file submissions. That request was denied.

[9] Parks Canada decided to release the Records about which Brewster filed this review application claiming exemption from disclosure under s 20(1)(b), (c) and (d) of the Act. The Information Commissioner was added as a party.

### III. Analysis

[10] The relevant provisions of the Act are:

**19 (1)** Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

**(2)** The head of a government institution may disclose any record requested under this Act that contains personal information if

**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

**(2)** Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

**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 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;

...

(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

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

a) l'individu qu'ils concernent y consent;

b) le public y a accès;

c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

**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;

...

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) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

The Privacy Act, RSC 1985, c P-21, defines “personal information” as follows:

**3 ... *personal information***  
means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

**(a)** information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

**(b)** information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

**(d)** the address, fingerprints or blood type of the individual,

**(e)** the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

...

**3 ... *renseignements personnels*** Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

**a)** les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

**b)** les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

...

**d)** son adresse, ses empreintes digitales ou son groupe sanguin;

**e)** ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

...

[11] There are four issues in this review:

1. The applicability of s 20(1)(b) (financial, commercial, scientific information);
2. The applicability of s 20(1)(c) (disclosure causing financial injury);
3. The applicability of s 20(1)(d) (interference with contractual or other negotiations); and
4. The applicability of s 19 to some of the Records (personal information).

[12] The standard of review for s 44 reviews is correctness (*Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53, [2012] 1 SCR 23):

[53] There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to determine whether “the head of a government institution is required to refuse to disclose a record” and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a “review” under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 19; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 22. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure: see, e.g., *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at pp. 265-66; *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2003 FC 1422 (CanLII), at para. 3; *Dagg*, at para. 107. The term “*de novo*” may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.

[13] As confirmed by the Supreme Court, the burden under s 20 is on the party resisting disclosure.

[14] With respect to the matter of “personal information”, the Court must engage in a two-step process. Firstly, the Court determines, on a correctness standard, whether the information meets the definition; secondly, the Court examines the reasonableness of any discretionary decision to disclose such personal information.

In the present case, Parks Canada has not engaged in this exercise of discretion.

A. *Section 20(1)(b)*

[15] Brewster has failed to establish this exemption. In order to fall within s 20(1)(b), the information at issue “must actually contain ‘commercial information’” as noted in *Brainhunter (Ottawa) Inc v Canada (Attorney General)*, 2009 FC 1172, 356 FTR 166 [*Brainhunter*].

[16] It is too broad an argument that because Brewster is in business and engaged with Parks Canada on a proposed commercial enterprise, all records (in this case primarily correspondence) should be characterized as commercial.

[17] Section 20(1)(b) creates a class-based (as opposed to a harm-based) exemption. Inclusion in this class does not depend on the context surrounding the request. Brewster must objectively satisfy all three criteria of the provision – the type of information; its quality and treatment; and its provenance.



[18] The type of information covered by the provision typically includes costs, profits, pricing strategies, manufacturing processes, business or operations methods.

[19] As noted by the Minister and expanded upon by the Information Commissioner, administrative details such as page numbering, dates, location of information and e-mails scheduling meetings or phone calls are not the type of information contemplated by s 20(1)(b).

[20] Moreover, Brewster has failed to establish the confidential nature of the information at issue. It failed to provide concrete evidence of that characteristic.

As noted in *Brainhunter* at para 25, the party resisting disclosure must provide:

... actual direct evidence of the confidential nature of the remaining information which must disclose a reasonable explanation for exempting each record. Evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1). ...

[21] Examples of the type of documents Brewster claims are within the “class” include information in one document which has been made public in another; Parks Canada’s own information; publicly available Facebook pages; and summaries of public comments related to an environmental assessment.

[22] Further, Brewster has not demonstrated a reasonable expectation of confidentiality from Parks Canada nor has it shown that the company itself treated or even attempted to treat the information as confidential. The typical bottom of e-mail “confidentiality” note is not sufficient – such notes are largely format and platitudes.

[23] Lastly, Brewster failed to address, much less demonstrate, how the treatment of the information in issue would “foster its relationship with government for the public’s benefit”. There is no evidence of harm to open dialogue or the exchange of information which must be protected.

[24] The claim for exemption from disclosure on this ground has not been made out.

B. *Section 20(1)(c)*

[25] Brewster’s difficulties under s 20(1)(b) were repeated in its claim under s 20(1)(c). Here the exemption is “harm-based”. The test is a “reasonable expectation of probable harm”.

[26] A review of the information at issue does not support a claim for harm. The allegation that the Records disclosed highly strategic considerations is not made out. The bulk of the information deals with meeting scheduling, logistics about the environmental assessment and the development of a goat tracking system in the Park.

[27] There is no evidence to establish how any of the Records would disclose Brewster’s well-regarded expertise in tourism operations. There was none of the usual type of information frequently seen in these cases showing a link between the information at issue, its importance and how that information could be used to harm Brewster or prejudice it in some way.

[28] It is insufficient to merely assert that harm will follow disclosure without a cogent supportable basis in fact.

C. *Section 20(1)(d)*

[29] There is no evidence that the disclosure of the Records would interfere with actual contractual negotiations or other business negotiations.

[30] Brewster has provided no evidence of actual contract negotiations that could be harmed by disclosure. Mere assertions of fears are insufficient.

D. *Section 19*

[31] Section 19 is a mandatory class-based exemption subject to several exceptions.

The Commissioner has identified a number of instances (names, e-mail addresses, etc.) where personal information would be disclosed.

[32] I agree with the Commissioner and would order that the Records be reviewed and the information identified by the Information Commissioner be redacted before the Records are released.

IV. Conclusion

[33] The Court concludes that, subject to the redactions mentioned above, the Applicant's application for judicial review and prevention of disclosure of the Records will be denied. Both the Respondent and the Information Commissioner of Canada will have their costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**, subject to the redactions for Personal Information, the Applicant's application for judicial review and prevention of disclosure of the Records is denied and the Records in issue are to be released. Both the Respondent and the Information Commissioner of Canada are to have their costs.

"Michael L. Phelan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-5-15

**STYLE OF CAUSE:** BREWSTER INC. v THE MINISTER OF THE ENVIRONMENT, AS THE MINISTER RESPONSIBLE FOR PARKS CANADA AND THE ATTORNEY GENERAL OF CANADA AND THE INFORMATION COMMISSIONER OF CANADA

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** DECEMBER 10, 2015

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** MARCH 21, 2016

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