Federal Court  Cour fédérale

Date: 20210219

Docket: T-188-19

Citation: 2021 FC 164

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 19, 2021

PRESENT: Associate Chief Justice Gagné

BETWEEN:

RÉGIS BENIEY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review that requires the Court to consider the right of federal government employees to their image as a component of their right to have their personal information protected. It also requires the Court to examine the interaction between the *Access to*

Information Act, RSC 1985, c A-1 [ATIA] and the *Privacy Act*, RSC 1985, c P-21 [PA], as well as the balance between the rights that they seek respectively to promote and protect.

[2] Régis Beniey is a former employee of the Canada Border Services Agency [the Agency]. As part of a workplace dispute that occurred during his work shift that was scheduled to end at midnight on July 3, 2017, he requested access to the video recordings taken of his workplace during that evening.

[3] Relying on section 19 of the ATIA, his employer denied him access to the video recordings in which he did not appear and gave him access to the recordings in which he appeared, blacking out the faces of members of the public. It is acknowledged that the Agency was right to refuse to release images of members of the public; this is not at issue before me, nor is the way Mr. Beniey intends to use the video recordings.

[4] In his application for judicial review, Mr. Beniey criticized the Agency for having erred in its interpretation of the definition of "personal information" found in section 3 of the PA and, more particularly, the exception in paragraph 3(j), which specifically concerns information about employees of a government institution that relates to their position or functions.

II. Facts

[5] On the evening of July 3, 2017, the applicant was assigned to the Traveller section of the Queenston Bridge at Niagara-on-the-Lake. He was to complete a shift that was scheduled to end at midnight.

[6] An altercation occurred with one of his supervisors when he was asked to remain at his post until someone arrived to relieve him, which he anticipated being after his shift ended.

[7] That same day, the Agency began an investigation into the applicant's conduct.

[8] On July 29, 2017, the applicant made the access to information request that gave rise to this case; it reads as follows:

> [TRANSLATION]
>
> Location: Queenston Bridge Traveller Section bus counters area . . . I request the following documents: All of the reports written by employees and managers present at the primary bus counters, including the allegations made by . . . on 2017-07-03 between 11 p.m. and midnight. I request ALL of the reports written by all of the officers who had to write something in relation to this matter. I request that all true copies of the surveillance video recordings made between 11:30 p.m. and 12:06 a.m. that day in the bus counters area be disclosed to me. In particular those showing me interacting with Superintendent . . . , Superintendent . . . and all interactions between us between 11:45 p.m. and 12:06 a.m. I also request all true copies of the recordings from all of the surveillance cameras located on the ground floor . . . between 11:30 p.m. and 12:06 a.m. I want to see the comings and goings of employees leaving and arriving on site during this period.

[9] The Agency first responded to this request by disclosing part of the requested information. It based its refusal to disclose the remainder of the requested records on subsection 19(1) of the ATIA on the ground that they contained personal information.

[10] The applicant filed a complaint with the Information Commissioner of Canada [the Commissioner], alleging that he received only some of the requested video recordings and that they had been altered.

[11] On December 14, 2018, the results of the investigation carried out by the Commissioner were communicated to the applicant. The report stated that video recordings are retained for 30 days in accordance with the Agency's security video recording retention policy. As a result, some of the requested video recordings had been destroyed. Those that were not destroyed were retained by the Agency as part of its investigation into the applicant's conduct.

[12] The Commissioner told the Agency to resend a number of videotapes that had been in [TRANSLATION] "increased playback speed" mode for ease of viewing. The Agency complied with this request.

[13] However, the Commissioner confirmed the Agency's position that the applicant could only be given video recordings on which he appeared because the [TRANSLATION] "use of video cameras in a workplace is governed by a clear framework concerning the right to privacy". As a result, the Commissioner dismissed the applicant's complaint.

[14] The applicant's proceeding therefore concerns only what the Agency refused to disclose to him. It is based on subsection 41(1) of the ATIA, which reads as follows:

41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the	41 (1) Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision

matter that is the subject of the complaint.	des questions qui font l'objet de sa plainte.

[15] In an affidavit submitted to the Court, the assistant director of the Agency's Access to Information and Privacy Division explained the Agency's refusal in the following terms:

> [TRANSLATION]
>
> 21- In this case, the images that were taken are of travellers who passed through this border crossing on July 3, 2017 and of other [Agency] officers who were on duty that day. These images are personal information, as defined in section 3 of the PA;
>
> 22- The . . . Division decided to remove the images of the other [Agency] officers who were on duty on July 3 for the following reason: although in principle, section 19 of the ATIA does not apply to employee information under paragraph 3(j) of the PA, images of employees are not included in the examples under paragraphs 3(j) to 3(m). We drew a parallel between the faces of our employees and the personal information mentioned in paragraphs 3(c) and 3(d) of the PA, that is to say, "*any identifying . . . other particular*" and "*fingerprints*", personal information that we must refuse to disclose pursuant to subsection 19(1) of the ATIA;
>
> . . .
>
> 24- . . . When the applicant appears with his coworkers and they can all be seen interacting, the image of other [Agency] officers may be disclosed because that image falls under paragraph 3(j) of the PA. However, if the applicant does not appear in a video and only his coworkers do, it was deemed necessary to redact those images because they are personal information under subsection 19(1) of the ATIA;

[16] Four video recordings are at issue in this application; they are identified as follows:

> Traffic_Bus_Passenger_Pil_2017-07-12_1714
>
> Traffic_Bus_Passenger_Secondary_1_2017-07-14_1700
>
> Traffic_Bus_Passenger_Secondary_2_2017-07-14_1707

Traffic_Corr_Outside_1131_2017-07-18_1426

III. Issues and standard of review

[17] This application for judicial review raises the following questions:

A. *Did the Agency err in its interpretation of subsection 19(1) of the ATIA?*

B. *If not, could the Agency nevertheless disclose the requested video recordings pursuant to section 25 of the ATIA?*

[18] Because the parties' submissions were filed before the Supreme Court had rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], I asked the parties to be prepared to take a position, at the hearing, on that decision's impact on the applicable standard of review. The parties took an unusual position. The respondent, who supports the Agency's decision, argued for the standard of correctness while the applicant, who challenges the decision, argued for the standard of reasonableness. The respondent is of the view that the issues under consideration fall under one of the exceptions to the presumption of reasonableness review specifically established by the Supreme Court, a view that the applicant does not share.

[19] I agree with the respondent. In *Vavilov*, the Supreme Court specifically set out two situations where the presumption of reasonableness review is rebutted:

> [17] . . . The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an

> administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. . . .

[20] I am of the opinion that what justified the application of the correctness standard prior to *Vavilov* justifies maintaining this standard of review post-*Vavilov*: this aligns with the will of Parliament.

[21] After having stated that the purpose of the ATIA is to enhance the accountability and transparency of federal institutions in accordance with the principle that government information should be available to the public, Parliament clearly indicated that "decisions on the disclosure of government information should be reviewed independently of government" (ATIA, subsection 2(1) and paragraph 2(2)(a)).

[22] The powers of the Court that is hearing an application under section 41 of the ATIA are set out in sections 49 to 53 of the ATIA. Section 49 is clearly indicative of Parliament's intention to confer on the Court a broad power of intervention:

49 Where the head of a government institution refuses to disclose a record requested under this Part or a part thereof on the basis of a provision of this Part not referred to in section 50, the Court shall, if it determines	49 La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de

that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.	la présente partie autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

[23] In my view, this provision is completely inconsistent with the application of a standard of review other than correctness. Parliament clearly expressed its will to have the merits of a request for access to information ultimately be determined by the Court, regardless of the position of the federal institution. I will therefore apply the standard of correctness to review the Agency's decision and the issues raised by the applicant.

IV. Analysis

A. *Did the Agency err in its interpretation of subsection 19(1) of the ATIA?*

[24] The disclosure of personal information by a government institution is governed by the ATIA and the PA. These two Acts are complementary. They must be construed harmoniously with one another, and neither takes precedence over the other (*Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at paragraphs 46–48, 51, 55 [*Dagg*]; *Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 at paragraphs 21–22 [*Canada v Canada*]).

[25] The ATIA gives individuals a right of access to government information. The PA permits them to gain access to information about themselves held by the federal government and limits the government's ability to collect, use and disclose personal information to third parties (*Dagg* at paragraph 47).

[26] To advance the purpose of the ATIA, i.e., the transparency of government operations, section 4 provides for general access to the records of federal institutions and specifies that any Canadian citizen or permanent resident shall, on request, be given access to any record under the control of a government institution.

[27] However, subsection 19(1) of the ATIA sets out an exception to this rule: the government institution shall refuse to disclose any record containing personal information.

[28] The definition of "personal information" can be found in section 3 of the PA. Its opening words are very broad and concern any information about an identifiable individual that is recorded in any form. Paragraphs (a) to (i) provide non-exhaustive examples of information that falls under the broad definition.

[29] However, following the definition and the non-exhaustive examples are some exceptions that apply specifically to section 7 (time frame within which to respond to a request for access), section 8 (request concerning another government institution), section 26 (refusal in the event that the record is about to be published) and section 19 of the ATIA. The exception that concerns us can be found in paragraph 3(j) of the PA under the definition of "personal information":

. . . does not include	…les renseignements personnels ne comprennent pas les renseignements concernant :
(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,	j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
(i) the fact that the individual is or was an officer or employee of the government institution,	(i) le fait même qu'il est ou a été employé par l'institution,
(ii) the title, business address and telephone number of the individual,	(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,
(iii) the classification, salary range and responsibilities of the position held by the individual,	(iii) la classification, l'éventail des salaires et les attributions de son poste,
(iv) the name of the individual on a document prepared by the individual in the course of employment, and	(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,
(v) the personal opinions or views of the individual given in the course of employment,	(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

[30] In *Dagg*, Justice La Forest (Justice La Forest dissented on the result but the majority agree with his analysis on this point) noted that the definition of personal information provided in section 3 of the PA is undeniably expansive—in any form—such that the exceptions should not limit its scope (at paragraph 68).

[31] It is also acknowledged by the applicant that the images of the government employees, which allows them to be identifiable, contain personal information which, in the absence of any exception, would fall under the opening words of section 3 of the PA.

[32] The federal government therefore has the burden of establishing that the information that it refused to disclose does not fall into paragraph 3(j) of the PA (section 48 of the ATIA). Again, the examples of information relating to the position or functions of a government employee that Parliament provides in this provision are not exhaustive.

[33] In *Dagg*, the Court had to determine whether Department of Finance employee sign-in logs fell within the scope of paragraph 3(j) of the PA with the understanding that they certainly concerned identifiable individuals. Justice Cory, writing for the majority, found that this was indeed information about the nature of a particular position. In paragraph 8 of his reasons, he seems almost to equate a federal employee's presence in the workplace with the performance of his or her duties:

> The number of hours spent at the workplace is generally information "that relates to" the position or function of the individual, and thus falls under the opening words of s. 3(j). It is no doubt true that employees may sometimes be present at their workplace for reasons unrelated to their employment. Nevertheless, I am prepared to infer that, as a general rule, employees do not stay late into the evening or come to their place of employment on the weekend unless their work requires it. Ordinarily the workplace cannot be mistaken for either an entertainment centre or the setting for a party. The sign-in logs therefore provide information which would at the very least permit a general assessment to be made of the amount of work which is required for an employee's particular position or function.

[34] In my opinion, it is difficult to imagine how the image of a border services officer, taken while the officer is in uniform and on duty for his or her employer, could be excluded from the scope of paragraph 3(j) of the PA.

[35] A distinction should also be made between information on a video recording taken when an employee arrived and left work and information on the employee's sign-in logs. In both cases, although "this information may not disclose anything about the nature of the responsibilities of the position, it does provide a general indication of the extent of those responsibilities" (*Dagg* at paragraph 9). Even more importantly, I find it difficult to see how images taken while border officers exercise their duties would not be information concerning the nature of the responsibilities of the position.

[36] In *Canada v Canada*, the Court had to determine whether the information requested concerning the previous postings of four Royal Canadian Mounted Police (RCMP) officers was information as defined in paragraph 3(j) of the PA. Somewhat like in this case, the government institution was attempting to make a circular argument. Since employment history was given as an example of personal information in paragraph 3(b), it could not fall under the general exception found in the opening words of paragraph 3(j).

[37] It should be noted that in this case, the Agency explained its refusal as follows:

> [TRANSLATION]
>
> 22- The . . . Division decided to remove the images of the other [Agency] officers who were on duty on July 3 for the following reason: although in principle, section 19 of the ATIA does not apply to employee information under paragraph 3(j) of the PA, images of employees are not included in the examples under

> paragraphs 3(j) to 3(m). We drew a parallel between the faces of our employees and the personal information mentioned in paragraphs 3(c) and 3(d) of the PA, that is to say, "*any identifying . . . other particular*" and "*fingerprints*", personal information that we must refuse to disclose pursuant to subsection 19(1) of the ATIA;

[38] In other words, because the images do not appear in the examples of information that cannot be considered personal under paragraph 3(j)—which, it should be noted, are not exhaustive—the Agency limits the general scope of the opening words of paragraph 3(j) by drawing a parallel with the examples of personal information listed in paragraphs 3(c) and (d). In order to even initiate the analysis under paragraph 3(j) of the PA, the information at issue must be able to identify an individual.

[39] In *Canada v Canada*, Justice Gonthier easily recognized, as did the parties, that a chronological list of postings of RCMP officers, their years of service and their anniversary dates of service correspond exactly to employment history and that such information falls under the example of personal information provided in paragraph 3(b) of the PA.

[40] Justice Gonthier stated the following in response to the argument that paragraph 3(b) restricted the temporal scope of paragraph 3(j):

> 29 . . . Furthermore, I note that the examples given in this section [3j)] are not exhaustive and do not reduce the general scope of the introductory phrase. Parliament has clearly expressed its intention that the introductory phrase keep its wide and general meaning by providing only non-exhaustive examples. It uses the expression "including" or "*notamment*" in the French version. I had the opportunity in *Lavigne*, *supra*, to express the following comments regarding the meaning of that expression in the context of the application of the *Privacy Act*, at para 53:

> Parliament made it plain that s. 22(1)(*b*) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word "*notamment*", in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression "without restricting the generality of the foregoing". This Court has had occasion in the past to examine the interpretation of the expression "without restricting the generality of the foregoing" in similar circumstances: in *Dagg, supra,* at para. 68, La Forest J. analyzed s. 3 of the *Privacy Act*, the wording of which resembles the wording of s. 22(1)(*b*) of that Act:
>
> > In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91.

Thus, the list of examples provided in s. 3(j) is not exhaustive, and certainly does not limit the application of the introductory paragraph to the current position held by an employee or to the last position occupied by an employee now retired. The purpose of s. 3(j) is to ensure that the state and its agents are held accountable to the general public. Given the lack of any indication that Parliament intended to incorporate such a limitation into the legislation, the fact that a public servant has been promoted or has retired should not affect the extent to which she or he is held accountable for past conduct.

[41] As with the RCMP in *Canada v Canada*, I am of the opinion that the Agency erred in limiting the general scope of the openings words of paragraph 3(j) by using one of the non-exhaustive examples of personal information found in paragraphs 3(a) to 3(i) of the PA.

[42] I am therefore of the view, after referring to the texts of the Acts at issue and considering their respective purpose, that the video recordings that the applicant has requested access to do not fall under subsection 19(1) of the ATIA and that they must be disclosed to the applicant.

B. *If not, could the Agency nevertheless disclose the requested video recordings pursuant to section 25 of the ATIA?*

[43] Since I have come to the conclusion that the Agency erred in its interpretation of paragraph 3(j) of the PA and, consequently, of section 19 of the ATIA, the debate surrounding the application of section 25 of the ATIA is for all intents and purposes moot. The faces of the Agency's employees do not need to be redacted whereas those of members of the public appearing in the videos given to the applicant have already been covered with black boxes. It is therefore possible for the Agency to do the same with the additional video recordings that will be given to the applicant.

V. Conclusion

[44] For these reasons, I would allow the applicant's application for judicial review and order the Agency to disclose to him the video recordings identified at paragraph 16 of these reasons, with costs.

JUDGMENT in T-188-19

THE COURT'S JUDGMENT is as follows:

1. The applicant's application for judicial review is allowed;
2. The Canada Border Services Agency is required to disclose to the applicant the video recordings of the images taken at the Traveller section of the Queenston Bridge in Niagara-on-the-Lake on July 3, 2017, identified as follows:

   Traffic_Bus_Passenger_Pil_2017-07-12_1714

   Traffic_Bus_Passenger_Secondary_1_2017-07-14_1700

   Traffic_Bus_Passenger_Secondary_2_2017-07-14_1707

   Traffic_Corr_Outside_1131_2017-07-18_1426
3. Costs are awarded to the applicant.

"Jocelyne Gagné"
Associate Chief Judge

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Olga Redko	FOR THE APPLICANT
Lyne Prince	FOR THE RESPONDENT

SOLICITORS OF RECORD:

IMK LLP Montreal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT