

Federal Court



Cour fédérale

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Date: 20210716

Docket: DES-7-19

Citation: 2021 FC 750

Ottawa, Ontario, July 16, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

KRISTIN ERNEST HUTTON

Respondent

JUDGMENT

UPON the applications of the Attorney General of Canada [AGC] pursuant to s 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] to prohibit disclosure of portions of a Note to File and other documents pertaining to the investigation of a complaint by the former Office of the Communications Security Establishment Commissioner [OCSEC];

AND CONSIDERING the evidence presented and the written and oral submissions of counsel for the AGC and Kristen Ernest Hutton, acting on his own behalf, during a public hearing conducted by videoconference on April 29, 2021;

AND CONSIDERING the evidence presented and the written and oral submissions of counsel for the AGC and Anil Kapoor, *Amicus Curiae*, during and following an *ex parte, in camera* hearing conducted on June 15, 2021;

AND CONSIDERING the Order and Reasons issued simultaneously with this Judgment in Court Files Nos T-268-17, T-1143-19 and T-868-21, whereby those proceedings are stayed pursuant to s 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7, pending: (a) the final resolution of the Law Society of Ontario's examination of Mr. Hutton's capacity to practice law; or (b) Mr. Hutton's appointment of counsel to represent him in those proceedings;

AND CONSIDERING that:

- (a) the documents in issue are subject to disclosure in two proceedings before this Court;
- (b) Court File No T-268-17 is a civil action commenced by Mr. Hutton in which he alleges that two named Defendants are, or were previously, undisclosed intelligence agents of Her Majesty the Queen and have caused him harm;
- (c) Court File No T-1143-19 is an application for judicial review commenced by Mr. Hutton of the OCSEC's dismissal of his complaint that the Communications

Security Establishment [CSE] intercepted and manipulated his electronic communications;

- (d) this Court has found that Mr. Hutton's efforts to prove his allegations against the named Defendants in the civil action are a form of harassment, and that his claims have no apparent basis in reality and appear to be predicated on delusions (*Hutton v Sayat*, 2020 FC 1183 at paras 1-2); and
- (e) the Law Society of Ontario is currently examining Mr. Hutton's capacity to practice law, and has ordered that he undergo a psychiatric assessment – Mr. Hutton's appeal of that order was heard on July 7, 2021, and judgment has been reserved;

AND CONSIDERING that:

- (a) Court File No DES-7-19 pertains to the disclosure of the OCSEC Note to File and related documents in Court File No T-1143-19;
- (b) Court File No DES-5-21 pertains to the disclosure of the OCSEC Note to File in Court File No T-268-17; and
- (c) by Order dated March 25, 2021, the two applications were consolidated and have continued as Court File No DES-7-19;

AND CONSIDERING the tripartite test to determine whether the Court should maintain the confidentiality of information the disclosure of which is alleged to be injurious to

international relations, national defence or national security (*Ribic v Canada* (2003), 185 CCC (3d) 129 (FCA)), namely:

- (a) whether the information the AGC seeks to protect is relevant to the underlying proceedings;
- (b) if so, whether disclosure of the information would be injurious to international relations, national defence or national security; and
- (c) if so, whether the public interest in disclosure outweighs in importance the public interest in non-disclosure;

AND UPON being satisfied that:

- (a) the information the AGC seeks to protect is relevant to the underlying proceedings (*Huang v Canada (Attorney General)*, 2017 FC 662 at para 44);
- (b) disclosure of the information would be injurious to national security, insofar as it tends to reveal: (i) subjects of investigative interest to CSE; (ii) confidential techniques and capabilities; and (iii) confidential procedures, methodologies and employees' names; and
- (c) the public interest in disclosure of a summary of the information, and the conclusion of the OCSEC Note to File, outweighs in importance the public interest in non-disclosure;

AND CONSIDERING that:

- (a) OCSEC has informed Mr. Hutton by letter dated June 25, 2019 that it has “independently investigated the matters raised in [Mr. Hutton’s] correspondences”, and has “verified CSE’s holdings and questioned CSE employees”, and has “concluded that CSE’s activities were lawful”;
- (b) CSE has informed Mr. Hutton by letter dated August 17, 2020 that it never employed the individuals named in his complaint, and that it complied with former s 273.64(2)(a) of the *National Defence Act*, RSC 1985, c N-5, which prohibited CSE from directing its activities at Canadians or any persons in Canada; and
- (c) the Canadian Security Intelligence Service [CSIS] has informed Mr. Hutton by letter dated February 19, 2020 that his allegations “have been carefully reviewed and appropriate internal inquiries have been made”, and has provided its assurance that “CSIS is not involved in the circumstances [Mr. Hutton] allege[s] and that none of the individuals [he] allege[s] work for CSIS are in fact employees or contractors of the Service”;

AND CONSIDERING that the [REDACTED]

[REDACTED] and any disclosure of information resulting from these applications will occur in the unique circumstances of this case and will not serve as a general precedent for disclosure in other cases;

AND CONSIDERING that the public interest in disclosure relates to both the civil action and the application for judicial review, and encompasses the value of providing the parties with accurate information regarding Mr. Hutton's unfounded and harmful allegations;

AND CONSIDERING the *Amicus Curiae*'s position that the public interest requires disclosure of the answers to the following questions, to permit the fair and just resolution of Court File No T-1143-19:

- (a) what did OCSEC do to investigate Mr. Hutton's complaint?
- (b) what did OCSEC learn about the matters complained of?
- (c) what is OCSEC's particular response to the matters raised by Mr. Hutton, as reflected in the conclusion to the OCSEC Note to File?

AND CONSIDERING the AGC's position that any disclosure of the information in issue will be injurious, but if the Court orders disclosure despite the AGC's objections, then the injury may be minimized by disclosure of a public summary and the imposition of strict conditions upon Mr. Hutton's use of that summary;

AND UPON being satisfied that the public summary prepared by the AGC, as amended in the manner proposed by the *Amicus Curiae*, coupled with disclosure of the conclusion of the OCSEC Note to File, will provide meaningful disclosure to the parties while limiting or minimizing the injury to national security that would result from full disclosure of the information the AGC seeks to protect (*Canada (Attorney General) v Almallki*, 2011 FCA 199 at para 37);

AND CONSIDERING that the correspondence from OCSEC dated June 25, 2019, from CSE dated August 17, 2020, and from CSIS dated February 19, 2020, were all disclosed to Mr. Hutton without conditions, and there is therefore no need to impose conditions upon Mr. Hutton respecting disclosure of the public summary of information or the conclusion of the OCSEC Note to File;

THIS COURT’S JUDGMENT is that:

1. The attached public summary shall be disclosed to Mr. Hutton;
2. The attached copy of the redacted OCSEC Note to File, including the unredacted conclusion, shall be disclosed to Mr. Hutton; and
3. In all other respects, the applications of the AGC pursuant to s 38.04 of the CEA to prohibit the disclosure of information is granted.

“Simon Fothergill”

Judge

ANNEX/SCHEDULE A

ANNEX/SCHEDULE B
