Federal Court  Cour fédérale

Date: 20241011

Docket: T-543-23

Citation: 2024 FC 1616

Toronto, Ontario, October 11, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED

Applicant

and

CANADA-NEWFOUNDLAND & LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Geophysical Service Incorporated (GSI), seeks judicial review of the Canada-Newfoundland and Labrador Offshore Petroleum Board's (C-NLOPB) decision to refuse the release of information pursuant to a request (Request) under the *Access to Information Act*, RSC 1985, c A-1 (the Act).

[2] The Applicant submits that the Respondent interpreted the Request in an unreasonably narrow fashion, used inapplicable exemptions, and exercised its discretion in an unreasonable manner by withholding or redacting information that was responsive to the Request. The Respondent's position is that the impugned information should be exempt from disclosure.

[3] For the reasons that follow, I agree with the Respondent. This application for judicial review is dismissed because I determine that the requested information is exempt from disclosure.

II. Background

[4] On April 3, 2012, the Applicant submitted the Request to the Respondent seeking:

> All correspondence, contracts, meeting notes, meeting agendas, presentations, communications, policies, notices, letters, legal opinions, determinations, briefs, plans, transmittals, Purchase Orders, Invoices, Checks, shipping documents, lists, or records relating to the board collecting, obtaining or maintaining in its possession any GSI digital Seismic data, Seismic Images, field data in any format or media. This request is for the timeframe 2005-2011.

[5] On October 24, 2012, the Respondent issued a decision in response to the request (Initial Decision). The Applicant was provided with records in response to the request but the Respondent severed documents that were not relevant to the Request or fell under exemptions to the Act.

[6] On October 31, 2012, the Applicant filed a complaint about this response with the Office of the Information Commissioner of Canada (Commissioner). While that complaint was in process, the Respondent re-reviewed the Request and amended its Initial Decision. In a letter dated February 13, 2013, the Respondent issued an amended decision (Second Decision) quoting sections of the Act relating to severance of information and re-affirmed the severance of documents that were not relevant to the Request.

[7] In a decision dated January 27, 2023, the Commissioner found that GCI's complaint was not well-founded. The Commissioner found that the Respondent reasonably exercised its discretion to withhold information under various provisions of the Act, having considered all relevant factors. The Commissioner also found that most of the information met non-disclosure requirements under the Act.

[8] In a Notice of Application dated March 17, 2023, the Applicant filed for judicial review of the Respondent's Initial Decision. The Applicant alleged that the Respondent relied on inapplicable exemptions or exclusions in the Initial Decision or alternatively that the Respondent unreasonably exercised its discretion in relying upon the applicable exemptions. The Applicant further stated that some of the withheld information should have been disclosed pursuant to section 25 of the Act. The Applicant seeks an order directing the Respondent to disclose some or all of the withheld information, costs of this application, or other relief that the Court deems just.

III. Preliminary Issue – objection to new issue raised by the Applicant

[9] The Respondent asserts that the Applicant raises a new issue when it argues that the request for information was interpreted by the Respondent in an unreasonably narrow manner. When the issue arose at the Applicant's cross-examination of Mr. Trevor Bennett in April 2024, the Respondent strongly objected. It reiterated that objection in written submissions and at the hearing of this matter.

[10] The Respondent argues that the Court should not decide this issue because it is not described in the Applicant's Notice of Application, nor in the Applicant's supporting affidavit of Harold Paul Einarsson, and there is no evidentiary basis for the issue. The Respondent argues that

it has not had a proper opportunity to make submissions on the issue and would therefore be prejudiced if the issue were considered and determined.

[11] The Applicant replies that the Notice of Application speaks to the issue when it refers to the refusal of access to records and that its supporting affidavit refers to the Respondent's "overly narrow" approach to the request.

[12] I agree with the Respondent that the issue was not previously raised and should not be considered. An allegation that documents were improperly redacted and severed, as it appears in the Notice of Application and the Applicant's supporting affidavit, is qualitatively different from an allegation that there were other relevant documents improperly excluded. The latter allegation was not clearly raised by the Applicant until the cross-examination of the Respondent's affiant.

[13] Under Rule 301 of the *Federal Courts Rules*, SOR/98-106 [FC Rules], the Court will not consider grounds of review that are absent from a Notice of Application (*Boubala v Khwaja*, 2023 FC 658 [*Boubala*] at para 27; *Hart v Canada (Attorney General)*, 2022 FC 1241 at para 40). The Notice of Application did contain a generic "basket clause" requesting "[s]uch further and other relief as this Honourable Court deems just," and these clauses can, in appropriate circumstances, be used to encompass additional grounds. However, the additional relief must be ancillary to the primary relief, and any consequent prejudice to the Respondent must be considered (*Boubala* at para 28).

[14] In my view, there would be substantial prejudice to the Respondent in entertaining this issue. The Respondent correctly points out that it did not have the opportunity to file evidence in response to this argument raised in the Applicant's Memorandum of Fact and Law, as both the Applicant and the Respondent filed their records to the Court in sealed envelopes in May 2024,

after the deadline for the Respondent to file a supporting affidavit has passed, which was March 18, 2024. The Respondent's prejudice in this new argument being raised militates against hearing the Applicant's argument regarding the Respondent's interpretation of the Request.

[15] Moreover, the sole evidence relied upon by the Applicant to substantiate this ground is Mr. Bennett's testimony from his cross-examination. Without evidence from the Respondent on this issue, or other supporting evidence from the Applicant, there is little on the record to sustain the Applicant's argument.

[16] Finally, the Applicant could have moved for an amendment to their Notice of Application, given the Respondent's clear objections to the issue at the cross-examination of Mr. Bennett and in written submissions (*Vachon Estate v Canada (Attorney General)*, 2024 FC 709 at para 9; FC Rules, s 75). The Applicant's failure to do so also militates against hearing this new issue.

[17] Nevertheless, even if I were persuaded to consider and decide this issue, and even without the benefit of the Respondent's submissions on the matter, I would determine that the Respondent's interpretation of the request was not unreasonably narrow.

[18] The Applicant submits that the Respondent did not search for or produce any records in which other parties submitted work using the Applicant's seismic data. According to the Applicant, this is a subjective and arbitrary interpretation of what constitutes the Applicant's data, inconsistent with the plain and ordinary meaning of the Request. The Applicant further submits that the Respondent failed to include data that was related to the Applicant but filed under a different operator's name, which was under the narrowest possible interpretation of the Request available to the Respondent. The Applicant submits that the Respondent further failed to include records

pertaining to claiming exploration credits, despite such evidence not being confidential (*Petro-Canada v Canada*, 2004 FCA 158).

[19] The Request was certainly to be read in light of the Act's purpose, which "is to provide a right of access to information in records under the control of a government" (*Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 [*Merck*] at para 22). Nonetheless, "when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development" (*Merck* at para 23).

[20] The Request sought "any GSI digital Seismic data, Seismic Images, field data in any format or media." Mr. Bennett testified that when "someone makes an agreement with another geophysical operator for their data, and then they reprocess or do additional work on it," it is no longer classified as the original operator's program. Mr. Bennett also testified that reports submitted to the Respondent are filed under the operator that submits them.

[21] I do not find the Respondent's interpretation of this aspect of the Request to be unreasonably narrow. The Applicant has not established that the data used by third party operators is in fact their own.

[22] The Applicant relies upon a definition of copyright whereby "[t]he question is whether or not the original work, or a substantial part thereof, has been reproduced" (*Great Canadian Oil Change Ltd v Dynamic Ventures Corp*, 2002 BCSC 1295 at para 46). However, Mr. Bennett's testimonial evidence does not establish a reproduction of the Applicant's original data. It establishes a third party "reprocessing" or "doing additional work" on the data. I do not find this evidence sufficiently clear and probative to establish that these third parties reproduced the

Applicant's data such that it was the Applicant's own, and thus had to be produced in response to the Request.

[23] Moreover, the broad purpose of the Act must be balanced against third party interests in commercial data. The term "commercial" involves information that pertains to trade or commerce (*Canada (Information Commissioner) v Canada (Transportation Accident Investigation and Safety Borad),* 2006 FCA 157 [*Canada Transport*] at para 69). The third parties' use of seismic data relates to agreements with other parties and programs on which they do "additional work." In my view, it is arguable that the data to which Mr. Bennett referred was third party commercial information, thus militating against its disclosure (*Canada Transport* at para 69; *Merck* at para 23). Whether or not the companies were "related" is not relevant to the response to the Request. At issue was the data itself, which has not been established as the Applicant's own for the purpose of the Request. It was therefore reasonable to interpret the Request in a manner that excluded such information.

[24] Furthermore, the Applicant has not provided evidence that the Respondent would have the Applicant's exploration credits. While the Respondent's responsibilities include issuing exploration licenses, the Applicant's suggestion that the Respondent was in possession of information on the Applicant's exploration credits has not been established.

[25] For these reasons, even without submissions from the Respondent on the issue, I find that the Respondent did not interpret the Request in an unreasonably narrow fashion.

IV. Issues and Nature of Review

[26] It is challenging to determine the nature of a Federal Court review under the Act based on the contradictory wording of the statute.

[27] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada established reasonableness as the presumptive standard of review in judicial review applications, subject to certain exceptions. One of those exceptions arises when the legislature clearly prescribes a standard of review other than reasonableness (*Vavilov* at paras 34–35).

[28] The Act contains a standard of review other than reasonableness. Specifically, in a review of a decision made under the Act, the Federal Court is required to conduct a *de novo* review rather than a review of a decision maker's decision (Act, s 44.1). This requires the Court's own determination regarding the applicability of exemptions from disclosure of information (*Canada (Health) v Elanco Canada Limited*, 2021 FCA 191 at para 15).

[29] However, several of the sections exempting the release of information under the Act provide a discretion to the decision-maker in applying the exemption. As stated by Justice Peter Pamel, the Act does not appear to authorize a judge on review to exercise this discretion because doing so would replace the institutional head who is solely authorized to perform this function under the Act (*Perreault v Canada (Foreign Affairs)*, 2023 FC 1051 [*Perreault*] at para 35).

[30] Thus, the Act requires this Court to conduct a *de novo* review, applying a provision with an explicit exercise of discretion assigned solely to an institutional head. A complete *de novo* review would either require the Court to exercise a discretion assigned by Parliament to the

institutional head under the legislation or ignore the authority of this discretion's exercise. Both options would require the Court to ignore the plain wording of the statute, which is not viable (*Perreault* at para 37).

[31] This dilemma has been resolved by bifurcating the review into a *de novo* review for the determination of whether the statutory exemption applies, and a reasonableness review of the decision maker's exercise of discretion (see *Perreault* at paras 40–41; *Matas v Canada (Global Affairs)*, 2024 FC 88 at paras 42–44).

[32] Unfortunately, applying this approach raises questions about the purpose of the reasonableness review. If the Court is authorized to apply the exemptions on a *de novo* review, the reasonableness review appears redundant. In the case of an unreasonable exercise of discretion, but an appropriate application of an exemption on a *de novo* review, the reasonableness review serves no other purpose than to deem the decision unreasonable, providing no consequent relief.

[33] Nevertheless, in my view a review that applies a reasonableness standard to the decision-maker's exercise of discretion while applying the exemptions in a *de novo* manner is the best method of conducting a full review in accordance with the Supreme Court's guidance while respecting the plain language of the Act.

V. Analysis

[34] I agree with the Applicant that the Respondent's exercise of discretion was unreasonable with respect to sections 21(1)(a)–(b) and 23 of the Act. However, I find that the records sought to be disclosed should not be disclosed, subject to one piece of information. I will first assess the

reasonableness of the exercise of discretion, then conduct a *de novo* consideration of the applicability of the exemptions.

A. *The Respondent's exercise of discretion*

[35] The Applicant submits that the Respondent unreasonably withheld relevant records in three manners: (1) the Respondent's application was improperly guided by the Applicant's identity contrary to subsection 4(2.1) of the Act; (2) the Respondent twice changed the claimed exemptions; and (3) the Respondent unreasonably applied exemptions in refusing to disclose certain records.

(1) The identity of the Applicant

[36] The Applicant states that the refusal to release records was based on the identity of the Applicant contrary to subsection 4(2.1) of the Act, which provides that a request for information is made "without regard to the identity of a person making a request for access to a record under the control of the institution."

[37] The Respondent states that ongoing litigation with the Applicant, rather than the identity of the Applicant, was the true basis of the decision. In his cross-examination, when asked why the litigation was considered relevant to the disclosure, Mr. Bennett responded that certain information in a request for proposal ought to be withheld in relation to litigation related to disclosure of seismic data.

[38] In my view, this explanation reveals that information was withheld not on the basis of who the Applicant was but what the Applicant was doing. Mr. Bennett was concerned not with the identity of the Applicant, but rather, the litigation itself.

[39] Furthermore, I do not find that Mr. Bennett demonstrated a "clear bias against GSI" in stating that the Applicant would not discontinue its actions against the Respondent. Mr. Bennett stated, perhaps mistakenly, that he assumed that the Applicant filed a claim after the Applicant had filed discontinuances against the Respondent. However, this is not enough to displace the presumption that the decision-maker was impartial (*Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105).

(2) The Respondent's change of exemptions

[40] While acknowledging that the Respondent was permitted to change the exemptions claimed prior to the Commissioner's decision, the Applicant alleges that the Respondent's change of exemptions on two occasions "demonstrates that the Respondent was less concerned about withholding records that fell within an enumerated exemption, and more concerned with identifying any exemptions that might apply to information it did not wish to disclose." The Respondent submits that it is irrelevant which exemptions the Respondent relied upon at first instance or during the Commissioner's investigation.

[41] I agree with the Respondent. There is no evidence to establish the Applicant's speculation. In fact, Mr. Bennett's affidavit instead explains how the different exemptions were applied throughout the process. The reasonableness of these applications is examined below.

(3) The Respondent's application of the exemptions

[42] I find that the Respondent's exercise of discretion under sections 16(2) and 18(a) of the Act was reasonable, but the exercise of discretion under sections 21(1)(a)–(b) and 23 of the Act was not.

(a) *Paragraph 16(2)(c) of the Act*

[43] Paragraph 16(2)(c) of the Act provides that a record may be withheld "that contains information that could reasonably be expected to facilitate the commission of an offence… on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems."

[44] The Applicant submits that it was unreasonable to find that the redacted information in the invoices could reasonably be expected to facilitate the commission of an offence, given someone would have to gain access to the Respondent's internal network to use the financial codes in the facilitation of an offence.

[45] The Respondent submits that the financial routing codes that were redacted could facilitate an offence as these codes could be used for illegal purposes if disclosed; moreover, the Respondent submits that the codes are nonetheless not responsive to the Applicant's Request.

[46] I agree with the Respondent that the exercise of discretion in withholding the financial codes under subsection 16(2) of then Act was reasonable.

[47] The Respondent withheld invoices it received with redacted financial codes. Mr. Bennett stated that he refused disclosure on the basis that "if such information were released and an individual gained access to the C-NLOPB's internal network the information could be used for the illegal movement of funds." In cross-examination, when asked how disclosure of such financial codes could facilitate the commission of an offence, Mr. Bennett replied that "with the cybersecurity issues that are going on and were going continually, we didn't feel it was prudent to

send out our internal records and filing numbers." He acknowledged that such codes were used by the Respondent's accounting department.

[48] It was reasonable for the Respondent to find that this information was not to be disclosed as Mr. Bennett's evidence was sufficient to meet the threshold of "reasonable expectation of facilitation" under subsection 16(2) of the Act. While there does not appear to be any decision interpreting this specific provision, paragraph 16(1)(c) of the Act bears the same language of "reasonable expectation." This Court has cited the Supreme Court in applying this provision with the criterion that "to establish a reasonable basis for a non-disclosure exemption… there must be a clear and direct connection between the disclosure of specific information and the injury that is alleged… '[t]he reasonable expectation of probable harm implies a confident belief.' In my view, these principles are equally applicable to a discretionary exemption under paragraph 16(1)(c) of the [Act]" (*Canadian Imperial Bank of Commerce v Canada (Canadian Human Rights Commission)*, 2006 FC 443 at para 64).

[49] Assuming that this standard applies to subsection 16(2) of the Act's "reasonable expectation" threshold under the interpretive principle of consistent expression, I find that the Respondent established a clear and direct connection between the disclosure of the financial codes and the alleged possibility of illegal movement of funds. While I appreciate the Applicant's point that Mr. Bennett's evidence requires a degree of speculation—namely, that someone would require access to the Respondent's internal system to illegally move funds—Mr. Bennett also testified to cybersecurity concerns with respect to this information. Considering that this exercise of discretion is reviewed for its reasonableness and the Court cannot reweigh this evidence (*Vavilov* at para 125), I do not find that the Applicant has established the exercise of discretion under subsection

16(2) fundamentally misapprehends evidence or is speculative such that it is unreasonable (*Vavilov* at paras 99, 126).

[50] This is buttressed, in my view, by the Commissioner's finding. The Commissioner found that the non-disclosure of this information under subsection 16(2) of the Act was reasonable based on "all relevant factors," including that the Respondent showed how the information could be reasonably be expected to facilitate the commission of an offence. I do not find this exercise of discretion unreasonable based on the record and the outcome reached (*Bélanger-Drapeau v Canada (National Defence)*, 2023 FC 461 [*Bélanger-Drapeau*] at paras 44–45).

(b) *Paragraph 18(a) of the Act*

[51] Paragraph 18(a) of the Act provides that disclosure of a record may be refused if it contains "trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value."

[52] The Applicant submits that it was "far-fetched" to claim that the invoices contained trade secrets with substantial value or that likely had substantial value, as "unless someone has hacked the CNLOPB's internal network, there is not even a possibility that these codes would have any monetary value."

[53] The Respondent submits that Mr. Bennett provided evidence that the financial codes in the invoices allowed for the illegal movement of funds and therefore had substantial value under paragraph 18(a) of the Act.

[54] In my view, the exercise of discretion under paragraph 18(a) of the Act to the documents in question is irrelevant due to the application of subsection 16(2). It is true that the Respondent has not led any direct evidence that the impugned information "has substantial value or is reasonably likely to have substantial value, a key component of the paragraph 18(a) exemption" (*Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683 at para 127). However, the evidence establishes that Mr. Bennett first applied paragraph 18(a) and subsequently applied subsection 16(2) to the invoices with redacted financial codes. The Commissioner noted that since subsection 16(2) applied, paragraph 18(a) did not need to be examined. Given these facts, I find that any error in the exercise of discretion in this matter is not sufficiently central to render the decision unreasonable (*Vavilov* at para 100).

(c) *Sections 21(1)(a) and 23 of the Act*

[55] Paragraph 21(1)(a) of the Act provides that a refusal of a record may be made when the record contains "advice or recommendations developed by or for a government institution or a minister of the Crown." Section 23 provides that a refusal of a record may be made when it contains "information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege."

[56] The Respondent applied these provisions to a briefing to the Chairman of the Respondent's board (Briefing) from the Respondent's legal department and a February 2012 memorandum (February Memo) to this board that includes legal advice. The Commissioner appears to have found the Briefing to be captured by section 23 rather than paragraph 21(1)(a). The Commissioner found that the February Memo was captured under section 23.

[57] The Applicant submits that the Respondent has not shown that it fully and transparently considered the arguments in favour of disclosing this withheld information nor weighed those arguments against the objectives of the Act (*Perreault* at para 78).

[58] The Respondent submits that the exercise of discretion in withholding these documents was reasonable given the solicitor-client privileged information in relation to ongoing litigation with the Applicant, information that would affect legal matters before the courts.

[59] The parties agree that the Briefing and February Memo are both covered by solicitor-client privilege. I also agree, as will be further explained below. The remaining question therefore is whether the Respondent "fully and transparently considered the arguments in favour of disclosing the information subject to solicitor-client privilege or weighed those arguments against the objectives of the Act" (*Perreault* at para 78).

[60] I find that the Respondent did not. This Court must determine, in examining the entirety of the evidence, that the Respondent "understood that there was a discretion to disclose and then exercised that discretion" (*Canada (Information Commissioner) v Canada (Transport)*, 2016 FC 448 [*Transport Canada FC*] at para 62, citing *Attaran v Canada (Foreign Affairs)*, 2011 FCA 182 at para 36).

[61] Mr. Bennett's affidavit demonstrates that he was aware of the discretion afforded under sections 21(1)(a) and 23 of the Act. It also shows his understanding of the contents of the Briefing and February Memo and how it relates to these provisions. There were no arguments submitted in favour of disclosing the information; instead, only the Request was sent, which Mr. Bennett reviewed. I do not take issue with this aspect of the Respondent's decision.

[62] The question remains as to whether the Respondent weighed the Request against the Act's objectives (*Perreault* at para 78; *Transport Canada FC* at para 67).

[63] The Act's primary purpose is "to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions" (s 2(1)). I cannot identify any evidence that the Respondent weighed the Request against this purpose with respect to the Request to disclose information found in the Briefing and February Memo. Instead, Mr. Bennett's affidavit demonstrates that he was concerned primarily with whether the exemptions applied, rather than considering whether they did not in light of the Act's objective. And while the Commissioner's finding about the Briefing is to be afforded significant weight, this Court has required that the arguments in favour of disclosure must be weighed against the Act's objectives (*Transport Canada FC* at para 67). I cannot discern such a weighing here, nor infer it from the evidence on the record. For these reasons, the Respondent's decision to not disclose information in the Briefing and February Memo is unreasonable.

[64] The Applicant further submits that the Respondent was unreasonable in applying circular reasoning when it exercised its discretion to withhold a December 2007 memorandum to the Respondent's Board (December Memo). Moreover, the Applicant submits that the Respondent provided no basis for exercising its discretion in applying paragraph 21(1)(a) to withhold a November 2007 memorandum to the Respondent's executive (November Memo). The Respondent does not make any specific submissions on these points, aside from stating that Mr. Bennett's affidavit outlines the considerations given in deciding not to disclose the information.

[65] I agree with the Applicant that the Respondent's explanation for withholding the December Memo is circular. In his affidavit, Mr. Bennet stated that "[t]he factors considered when deciding

to refuse to disclose this document included the fact that the data disclosure policy was not in fact implemented at that time." In cross-examination, when asked about this statement from his affidavit and how it factored into the withholding of the December Memo, he stated that it was "because it was an internal advice and recommendation… to our Board."

[66] Paragraph 21(1)(a) of the Act provides that a refusal of a record may be made when the record contains "advice or recommendations developed by or for a government institution or a minister of the Crown." The evidence establishes that the Respondent's justification for refusing to disclose the December Memo under this provision was because it was advice and recommendation. I agree with the Applicant that this reasoning is circular, and therefore unreasonable (*Vavilov* at para 104).

[67] Moreover, while Mr. Bennett's affidavit demonstrates that he was aware of the discretion afforded under paragraph 21(1)(a) of the Act and appreciated the nature of the November Memo, I cannot discern from the record that the Respondent considered factors in support of disclosing the November Memo in light of the Act's objective (*Transport Canada FC* at paras 66–67). In my view, Mr. Bennett's affidavit shows him to consider only the factors supporting non-disclosure, rather than any consideration of reasons for disclosure. This shows this aspect of the decision to lack justification in light of relevant legal constraints (*Vavilov* at para 101).

[68] For these reasons, the Respondent's decision to withhold records under sections 20(1)(a) and 23 of the Act is unreasonable. The question regarding whether that information should be disclosed will be answered below.

(d) *Paragraph 21(1)(b) of the Act*

[69] Paragraph 21(1)(b) of the Act provides that refusing to disclose a record may be on the basis that it contains "an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate."

[70] The Applicant submits that the Respondent unreasonably exercised its discretion under this provision in refusing to disclose a pre-approval audit (Audit), the Audit being presumably related to relevant documents disclosed in the Request. The Applicant further submits that Mr. Bennett's rationale for not including the Audit (given that it contains advice and recommendations from the Respondent's staff) is unreasonable given that the exemption cited was paragraph 21(1)(b), rather than 21(1)(a).

[71] The Respondent submits that the Audit is captured by paragraph 21(1)(b) given that it contains internal deliberations in relation to the audit of a seismic vessel and that it considered factors as to whether it should have exercised its discretion not to disclose these records.

[72] I agree with the Applicant.

[73] Mr. Bennett's affidavit discusses the rationale for refusing to disclose the Audit by providing that it contained notes of internal consultations and deliberation of the Respondent's staff and the fact that it was not relevant to the Request. On cross-examination, he was asked why the Audit formed part of the responsive records if it was not relevant, to which he replied, "it had GSI in it, and it talked about their seismic vessel."

[74] I find the Respondent's decision to be illogical. I agree with the Applicant that it was contradictory for the Respondent to include this Audit as a response to the Request, while also withholding information because it was irrelevant. The Respondent's explanation for withholding the Audit under paragraph 21(1)(b) lacks transparency and logic, rendering this aspect of the decision unreasonable (*Vavilov* at paras 101, 104).

[75] For these reasons, I find that the Respondent's exercise of discretion under sections 16(2) and 18(a) of the Act was reasonable, but the exercise of discretion under sections 21(1)(a)–(b) and 23 of the Act was not. The errors under these latter portions are serious, the rationale lacking justification in light of the facts and law, as well as at times being illogical. Overall, I find the decision unreasonable as a whole (*Vavilov* at paras 15, 100).

B. *The Applicability of the Exemptions*

(1) Section 24 of the Act

[76] The Applicant withdrew its request for disclosure of page 25 of the document and therefore an analysis of whether this document is exempt is not required.

(2) Sections 16(2)(c) and 18(a) of the Act

[77] As noted above, paragraph 16(2)(c) of the Act provides that a record may be withheld "that contains information that could reasonably be expected to facilitate the commission of an offence… on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems." The onus is on the Respondent to establish that this exemption applies to the redacted information in the invoices (Act, s 48(1)).

[78] I find these exemptions to apply for the same reasons that I find the Respondent's exercise of discretion to withhold this information under paragraph 16(2)(c) to be reasonable. The Respondent established a clear and direct connection between the disclosure of the financial codes and the alleged possibility of illegal movement of funds with respect to cybersecurity concerns about this information. This finding is buttressed by the Commissioner's conclusion (*Bélanger-Drapeau* at para 47; *Blank v Canada (Minister of Justice)*, 2005 FCA 405 [*Blank*] at para 12). I find the invoices are exempt pursuant to paragraph 16(2)(c). Thus, applying paragraph 18(a) to this information would serve no purpose, as explained above.

(3) Sections 21(1)(a) and 23 of the Act

[79] The Respondent submits that the Briefing and February Memo are both protected under sections 21(1)(a) and 23 of the Act as advice and solicitor-client privileged material. The Respondent makes no specific submissions on whether the December and November Memos ought to be exempted under these provisions. The Applicant does not make submissions on the *de novo* aspect of this claim and its submissions related solely to the reasonableness of the Respondent's decision under these provisions.

[80] I find all of these documents to be exempt from disclosure.

(a) *The Briefing*

[81] The Respondent submits that the Briefing is communication from legal counsel to a client, providing updates and legal advice on ongoing and potential litigation. The Respondent further submits that the Briefing is an internal advisory document that would otherwise not be disclosed.

[82] For a communication to be protected under legal advice privilege: "(1) the communication must be between a solicitor and his/her client; (2) the communication must seek or give legal advice; and (3) the intent of the parties must be that the communication is to remain confidential" (*Bélanger-Drapeau* at para 18, citing *Solosky v The Queen*, [1980] 1 SCR 821 [*Solosky*] at p 837 and *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 [*Canada OIC*] at para 49). The onus to establish privilege is on the party asserting privilege and "requires more than a bald assertion of privilege and will only be met if there is sufficient evidence to show that each of the three criteria of the *Solosky* test are met" (*Canada OIC* at para 50).

[83] The parties agree that the Briefing is covered by solicitor-client privilege. I also agree.

[84] Applying the three prongs of the test for privileged information, Mr. Bennett's affidavit states that the Briefing was from the legal department "providing legal advice in relation to the status of operations from that department including sections outlining ongoing litigation and prosecutions involving the C-NLOPB and potential legal issues pending, including specifically the ongoing legal issues raised by GSI." Reviewing the Briefing, I find this to be largely accurate. Mr. Bennett further provides that this advice was given from the Respondent's lawyers to the Chair of the Respondent's Board. Finally, the Commissioner found that "[t]he C-NLOPB explained how the parties intended for the records to remain confidential." In my view, this evidence therefore establishes a communication between the Respondent's lawyer and the Respondent giving legal advice that was meant to be confidential. The *Solosky* test is met.

[85] For these reasons, section 23 of the Act applies, and the Briefing should not be disclosed. While this renders the application of paragraph 21(1)(a) irrelevant, I have nonetheless considered whether the Briefing ought to be exempted under this provision.

[86] The purposes of paragraph 21(1)(a) include "removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions" (*3430901 Canada Inc v Canada (Minister of Industry (CA)*, 2001 FCA 254 [*Telezone*] at para 51). "Advice" includes "expressions of opinion on policy-related matters;" "recommendations" set "out a suggested course of action to the government institution" (*Telezone* at para 51; *Canada (Information Commissioner) v Canada (Public Safety and Emergency Preparedness*), 2012 FC 877 at para 31, appeal allowed in part on other grounds in 2013 FCA 104 at para 4). The Court has held that "'[m]ost internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph (a) or (b) of subsection 21(1)'" (*Mayrand v Canada (National Revenue)*, 2021 FC 814 at para 42, quoting *Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] 4 FC 245 (FC), 1999 CanLII 8293 at paras 39–40).

[87] The Respondent has not demonstrated that the Briefing falls under this exemption. Having reviewed the Briefing, I do not find the evidence demonstrates that the Briefing contains opinion on policy-related matters, nor a suggested course of action; rather, it contains critical issues, litigation, and "other issues." The sole evidence to establish this exemption, from Mr. Bennett's affidavit, is that the Briefing "contains advice and recommendations." Moreover, the Commissioner found that this exemption did not apply to the Briefing, and this will be given significant weight. The Respondent has therefore not established that the Briefing is exempt from disclosure under paragraph 21(1)(a) of the Act.

(b) *The February Memo*

[88] The Respondent submits that the February Memo was provided to the Respondent's Board providing legal advice on issues regarding the release of digital data, and as advice from the Respondent's lawyer to the Respondent, it is confidential.

[89] The February Memo is a memorandum to the Respondent's Board from external counsel with the purpose of advising the Board on two issues that may impact the Board's decision to commence releasing digital data. The Commissioner found that it was exempted as solicitor-client privileged information. In my view, this evidence establishes a communication between the Respondent's lawyer and the Respondent giving legal advice and the first two aspects of the *Solosky* test are met.

[90] Further, there is evidence of an intention to keep this communication confidential in the Commissioner's decision, although there is no evidence, as there was above, of intention to keep this communication privileged owing to the ongoing litigation between the Respondent and the Applicant. In any case, once more, the Commissioner's decision is a piece of evidence that deserves significant weight (*Bélanger-Drapeau* at para 47; *Blank* at para 12) and the Applicant agrees that this information is *prima facie* covered by privilege. Therefore, the third branch is met in these circumstances and the February Memo is exempt from disclosure under section 23 of the Act.

[91] Moreover, the evidence establishes that the February Memo contains opinion on policy-related matters or a suggested course of action under paragraph 21(1)(a). I find that the Respondent has established that the February Memo is to be exempt from disclosure under paragraph 21(1)(a) of the Act.

(c) *The December Memo*

[92] The Respondent makes no submissions on the December Memo's exemption under paragraph 21(1)(a). The Applicant focuses only on the Respondent's unreasonable exercise of discretion in not disclosing the December Memo, although conceding that the "this record contains advice and recommendations to the CNLOPB and therefore is *prima facie* covered by section 21(1)(a)" of the Act.

[93] In failing to make developed submissions on this issue in this application, the Respondent could be seen as failing to discharge its statutory onus to establish that the December Memo ought to be exempted from disclosure (Act, s 48(1)). However, I find that the December Memo is exempted from disclosure under paragraph 21(1)(a) of the Act given the evidence in the record.

[94] The issue in the December Memo is the Applicant's efforts to stop the Respondent from disclosing certain data, including legal analysis on whether the Respondent can disclose the data, options available to the Respondent, and a legal recommendation. The Commissioner found that the December Memo includes "recommendations and options to consider."

[95] I find that this evidence establishes that the information in the December Memo contains opinion on policy-related matters (*i.e.*, the Respondent's data disclosure policy) and sets out a suggested course of action for the Respondent (*i.e.*, the analysis, options, and recommendation to disclose the data). Buttressed by the Commissioner's finding, I find the December Memo contains both advice and recommendation to the Respondent and meets the criteria of paragraph 21(1)(a) of the Act and ought to be exempt from disclosure.

(d) *The November Memo*

[96] The Respondent also does not make submissions on whether the November Memo ought to be exempted under paragraph 21(1)(a) of the Act. The Applicant once more argues only that the Respondent's exercise of discretion in not disclosing the November Memo was unreasonable.

[97] Once again, there is an argument to be made that the Respondent has failed to discharge its statutory onus to establish that the November Memo ought to be exempted from disclosure through its failure to make developed submissions on this point. I nonetheless find that the November Memo should be exempted from disclosure under paragraph 21(1)(a) of the Act.

[98] The issue in the November Memo is similar to that of the December Memo: the Applicant's efforts to stop the Respondent from disclosing information. It includes background on the Applicant, the Applicant and data disclosure, a summary, recommendations, and options.

[99] Similar to the December Memo, I find that this evidence establishes that the information in the November Memo contains opinion on policy-related matters (*i.e.*, the Respondent's policy on data disclosure) and sets out a suggested course of action for the Respondent (*i.e.*, a summary and two options, including releasing the data or not releasing the data). Taken with the Commissioner's finding that the November Memo includes "recommendations and options," I find the November Memo meets the criteria of paragraph 21(1)(a) of the Act.

[100] For these reasons, I find that the Briefing and February Memo contain information that fit the exemption for disclosure under section 23 of the Act for containing solicitor-client-privileged information, although I do not find that the Briefing meets the exemption under paragraph 21(1)(a) of the Act. I also find that the February, December, and November Memos meet the exemption

under paragraph 21(1)(a) of the Act, because they contain advice and recommendation under the meaning of those terms in the Act.

(4) Paragraph 21(1)(b) of the Act

[101] The Respondent submits that the Audit and the minutes from a Board meeting (Minutes) Minutes contain accounts of consultations and deliberations under paragraph 21(1)(b) of the Act. The Respondent submits that the Audit is not responsive to the Request, and in the alternative, contains internal deliberations of the Respondent's staff in relation to the audit of a seismic vessel. The Respondent further submits that the Minutes is an account of consultation and deliberations that occurred during a board meeting on February 29, 2012.

[102] The Applicant submits that it is unclear why the Audit was included in the response to the Request if it was not relevant, and in any event, that the Respondent ought to have applied paragraph 21(1)(a) of the Act to exempt it from disclosure, rather than paragraph 21(1)(b). The Applicant does not challenge the Minutes being withheld.

(a) *The Audit*

[103] Subsection 4(1) of the Act provides that individuals have a right to and shall, on request, be given access to a document under a government institution's control, subject to exemptions and prohibitions found in the Act (s 13–24). The Audit was included in the documents that were deemed responsive to the Request, and as above, it appears that it formed part of the response to the Request due to containing information about the Applicant and its seismic vessel.

[104] As described above, I do not understand the Respondent's logic. Either the document is responsive to the Request, or it is not. In my review, however, the Audit does contain information

about the Applicant, appearing to be responsive to the Request, even if the Respondent failed to properly explain it accordingly.

[105] The question then is whether the Audit is exempted from disclosure pursuant to paragraph 21(1)(b) as "deliberations." The term "deliberation" under this provision has been defined as "careful consideration with a view to decision or the consideration and discussion of the reasons for and against a measure by a number of councillors" (*Information Commissioner of Canada v Canada (Minister of Environment)*, 2006 FC 1235 at paras 65–66, aff'd on appeal, cross-appeal allowed in part in 2007 FCA 404).

[106] The Audit contains notes asking questions as to whether GSI is in "non-conformance" and requiring further information from the Applicant, notes made by the Respondent's staff in relation to one of the Applicant's seismic vessels. In my view, this evidence qualifies as consideration (*i.e.*, the non-conformances) with a view to a decision (*i.e.*, a pre-approval). This information meets the requirements of paragraph 21(1)(b) of the Act.

(b) *The Meeting Notes*

[107] I agree with the Respondent that the Minutes fall under the exemption prescribed in paragraph 21(1)(b) of the Act. The Minutes contains summaries of various projects, "decision items" including recommendations on courses of actions for different items, communications about various reports, two "information items," and other items and dates for next meetings.

[108] I find that the decision items are careful considerations with a view to decision; as well as the Board members' deliberations about the Reports and Information Items. The information in the Minutes meets the requirements of paragraph 21(1)(b), subject to one caveat.

[109] I do not find that the information regarding the project described in the second paragraph of page 248 of the Respondent's Confidential Record contains consultations or deliberations such that the exemption under paragraph 21(1)(b) applies. There is nothing, in my view, that sees this information as "advice" or "consultations." It is simply a short description of a project.

(5) Conclusions regarding the application of exemptions

[110] For the reasons above, I make the following findings:

a) The Respondent has established that paragraph 16(2)(c) applies to the invoices given that there is a clear and direct connection between the disclosure of the financial codes and the alleged possibility of illegal movement of funds with respect to cybersecurity concerns about this information.

b) The Respondent has established that the Briefing and the February Memo meet the requirements of section 23 of the Act for containing solicitor-client-privileged information. The Respondent has not established that the Briefing meets the requirements of paragraph 21(1)(a) of the Act.

c) The Respondent has established that the February, December, and November Memos meet the requirements of paragraph 21(1)(a) of the Act given that the Memos contain opinion on policy-related matters setting out a course of action for the Respondent.

d) The Respondent has established that the Audit and almost all of the Minutes meet the requirements of paragraph 21(1)(b) of the Act for containing considerations with a view to a decision. However, one aspect of the Meeting Notes does not contain such considerations and does not meet the requirements of this provision.

VI. Conclusion

[111] In order to maintain fidelity to the statutory language of the Act, the nature of the review under section 44.1 must be bifurcated into a reasonableness review of the exercise of discretion, and a *de novo* consideration of the application of exemptions.

[112] The Respondent's exercises of discretion under sections 16, 18, 21, and 23 of the Act were reviewed for their reasonableness. I have found that the Respondent did not reasonably exercise its discretion in withholding the information in the Briefing, and February, December, and November Memos under paragraphs 21(1)(a)–(b) of the Act. The decision is therefore unreasonable.

[113] On a *de novo* consideration of whether the exemptions apply, I determine that the Audit, Briefing, Meeting Notes, and February, December, and November Memos meet the exemptions under sections 16, 18, 21(1)(a)–(b), and 23 of the Act, save for one part of the Meeting Notes.

[114] The Supreme Court in *Vavilov* provided that generally an unreasonable decision will be remitted to the decision-maker for reconsideration with the Court's reasons (at para 141). However, the Supreme Court also provided that "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (at para 142).

[115] In these circumstances, remitting the matter for reconsideration serves no useful purpose because the outcome of the Respondent's decision would be inevitable in light of this judgment.

JUDGMENT in T-543-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs to the Respondent.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-543-23
STYLE OF CAUSE:	GEOPHYSICAL SERVICE INCORPORATED v CANADA-NEWFOUNDLAND & LABRADOR OFFSHORE PETROLEUM BOARD
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 18, 2024
JUDGMENT AND REASONS:	BATTISTA J.
DATED:	OCTOBER 11, 2024

APPEARANCES:

Matti Lemmens	FOR THE APPLICANT
Amy M. Crosbie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stikeman Elliott LLP Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
Curtis Dawe Lawyers Barristers & Solicitors St. John's, Newfoundland	FOR THE RESPONDENT