

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190425

Docket: A-139-17

Citation: 2019 FCA 98

**CORAM: WEBB J.A.
BOIVIN J.A.
RENNIE J.A.**

BETWEEN:

MATTHEW G. YEAGER

Appellant

and

**MINISTER OF DEPARTMENT OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

and

ATTORNEY GENERAL OF CANADA

Respondents

and

INFORMATION COMMISSIONER OF CANADA

Intervener

Heard at Toronto, Ontario, on April 11, 2019.

Judgment delivered at Ottawa, Ontario, on April 25, 2019.

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

WEBB J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] Professor Matthew G. Yeager (the appellant) appeals from a decision of the Federal Court (*per* Elliott J.) dated March 30, 2017 (2017 FC 330) dismissing his application for judicial review under section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (ATIA).

[2] The facts of this matter date back more than ten years. On June 7, 2007, the appellant requested certain documents from the Access to Information Division (ATIP Division) of the Department of Public Safety and Emergency Preparedness (Department of Public Safety). The documents sought included the work plan, budget breakdown, staffing activities, and appointment papers for members of a recently announced Correctional Services Canada (CSC) Independent Review Panel (the CSC Review Panel). The CSC Review Panel was established by the Minister of Public Safety and Emergency Preparedness (Minister of Public Safety) for the purpose of assessing the operational priorities, strategies and business plans of CSC.

[3] The ATIP Division acknowledged receipt of the appellant's request, and directed the Department of Public Safety to search and locate any relevant records in the Department, if any existed. On June 15, 2007, the ATIP Division informed the appellant that “[a] search was conducted, and it was determined that there are no relevant records in the department [of Public Safety].” (Appeal Book, Vol. 1, Tab 8 at p. 187).

[4] On June 26, 2007, unsatisfied with the ATIP Division's response, the appellant filed a complaint with the Office of the Information Commissioner (OIC) providing examples of why he believed that the documents sought did, in fact, exist and should be disclosed by the Department of Public Safety.

[5] On December 10, 2008, the OIC informed the appellant that his complaint was not substantiated and that the Department of Public Safety did not possess records responsive to his request. The OIC indicated however, that during its investigation of the appellant's complaint, it had become apparent that CSC might possess documents responsive to the appellant's request. The OIC accordingly suggested that it was open to the appellant to file a separate request with CSC. The OIC further observed that, while the Department of Public Safety should have considered transferring the appellant's original request to CSC in accordance with section 8 of the ATIA, "this was unfortunately not done." (Appeal Book, Vol. 1, Tab 8 at p. 196).

[6] The appellant did not file a separate request to CSC but instead filed an application for judicial review on January 20, 2009 of the decision to dismiss his request for access to information.

[7] For ease of reference, the legislative provisions at issue in this matter are reproduced in the annex to these reasons.

II. Decision of the Federal Court

[8] As part of his application for judicial review before the Federal Court, the appellant alleged that the Minister of Public Safety had control of the requested documents, and, as such, could compel their disclosure whether from the Department of Public Safety or CSC, regardless of the fact that the appellant's request had been made to the Department of Public Safety. This is because, the appellant said, the Minister of Public Safety constituted the CSC Review Panel and both the Department of Public Safety and CSC fall under the same ministerial portfolio, an argument referred to in these proceedings as the "portfolio argument".

[9] In support of his application for judicial review, the appellant also submitted that section 8 of the ATIA imposed upon the Minister of Public Safety the obligation to transfer his request from the Department of Public Safety to CSC. The appellant argued that by failing to proceed with such a transfer, the Minister of Public Safety did not assist the appellant with his request as required pursuant to subsection 4(2.1) of the ATIA.

[10] The Federal Court dismissed the appellant's application for judicial review. It did so on the basis that there was no evidence to suggest that the Department of Public Safety erroneously stated that it did not hold responsive records (Federal Court's reasons at para. 42). The Federal Court also rejected the appellant's "portfolio argument" finding that the Department of Public Safety and CSC are listed as separate government institutions under Schedule I to the ATIA.

[11] The Federal Court further found that the Department of Public Safety had no obligation to transfer the appellant's request to CSC under section 8 of the ATIA, given that it did not have control over the records requested by the appellant. Absent such control by the Department of Public Safety, section 8 of the ATIA was "never triggered" (Federal Court's reasons at para. 72). For the same reason, the Federal Court rejected the appellant's argument based on subsection 4(2.1) of the ATIA.

[12] As a result, the Federal Court removed from the style of cause of this matter the name of the then Minister of Public Safety and granted costs in favour of the respondent. However, it offset these costs in the amount of \$1500 to compensate the appellant in accordance with subsection 53(2) of the ATIA.

III. Standard of Review

[13] This Court is required to adopt the standard of appellate review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 when assessing the Federal Court's finding that the Department of Public Safety did not have control of the requested records as well as the Court's interpretation of section 8 and subsection 4(2.1) of the ATIA (*Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 [National Defence] at para. 23). The Federal Court's finding concerning control, provided it was not premised on a wrong legal principle and absent palpable and overriding error, is entitled to deference. Its interpretation of the ATIA is reviewable on a standard of correctness.

[14] In respect of the narrow issue of whether the Department of Public Safety properly exercised its discretion under section 8 of the ATIA not to transfer the appellant's request to CSC, this Court is required to adopt the approach set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*] at paras. 45-47. Adopting this approach, this Court must therefore focus on the decision of the Department of Public Safety and determine whether, in reviewing it, the Federal Court identified the appropriate standard of review and applied it properly (*Agraira* at para. 47).

IV. Analysis

[15] On the basis of the evidence before it, the Federal Court concluded that the Department of Public Safety did not have control over the records. The Federal Court essentially rejected the appellant's "portfolio argument". This conclusion is consistent with the Supreme Court of Canada's decision in *National Defence*: a government institution under the ATIA does not include the office of the Minister who presides over it (*National Defence* at paras. 26 and 43). The appellant confuses ministerial accountability for a portfolio with the manner by which Parliament has determined that government records should be organized for the public access. The ATIA grants authority for handling access requests to the various government institutions listed under Schedule I to the ATIA and not to the Minister accountable for a particular portfolio. The Department of Public Safety and CSC are explicitly listed as separate government institutions, each with its own ATIP Division responsible for administering and responding to access requests as a matter of delegated authority under section 73 of the ATIA. The Department of Public Safety can accordingly not be held to have control of the requested records on the basis that these records might exist at CSC. It follows that the appellant's "portfolio argument" fails.

[16] Turning to the appellant's argument pursuant to section 8 of the ATIA and the obligation to transfer a request, the Federal Court concluded that a government institution must control the requested documents as a prerequisite to engaging section 8 of the ATIA (Federal Court's reasons at paras. 72, 82 and 86). I disagree. For the reasons that follow, this conclusion is unfounded.

[17] Section 8 of the ATIA sets forth the requirements for transferring a request for access to a record under the ATIA from a government institution to another. Specifically, when a government institution receives a request for access to a record and the head of the institution considers that another government institution has a "greater interest" in the record (subsections 8(1) and 8(3) of the ATIA) and that "the other government institution consents to process the request within the time limit" (subsection 6(1) of the *Access to Information Regulations*, S.O.R./83-507 (Regulations)), the said government institution has discretion to transfer a request, as indicated by the word "may"/"peut". It can also "if necessary"/"au besoin", transfer the record to the other government institution (subsection 8(1) of the ATIA). If the government institution exercises its discretion to transfer, it has fifteen days to do so and must provide written notice to requestor.

[18] Unlike sections 2, 4, and 6 of the ATIA, which explicitly contemplate the right of access in relation to records "under the control of" a government institution, or a government institution that "has control of a record", section 8 of the ATIA and section 6 of the Regulations do not contain any such language. Rather, under section 8 of the ATIA, if a government institution receives a request for access, it may "if necessary"/"au besoin" further transfer the requested

record when transferring the request. The language of section 8 (“if necessary”/“au besoin”) does not make “control of a record” by a government institution a requirement for a valid transfer of a request for access. Moreover, a control requirement in section 8 of the ATIA frustrates a timely and efficient transfer of a request for access from one institution to another. Had control of a record been a prerequisite for a government institution to consider transferring a request for access pursuant to section 8 of the ATIA, Parliament would have said so expressly. In the absence of express language regarding “control” as found in other provisions of the ATIA, it follows that the requirements for transfer of a request for access as set forth in section 8 of the ATIA may be engaged regardless of whether or not a government institution has control of a record.

[19] In the circumstances, it is therefore necessary to consider the reasonableness of the Department of Public Safety’s discretionary decision not to transfer the appellant’s request (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 51).

[20] The record discloses in a note to file made by Ms. Amanda Harrington of the ATIP Division that the Department of Public Safety assumed that section 8 of the ATIA could apply and that it was willing to execute a transfer on the OIC’s recommendation. However, there was some uncertainty regarding whether CSC would accept the transfer of a closed file (Appeal Book, Vol. 1, Tab 8 at p. 194):

Received call from OIC investigator [...] We discussed the note on file that there was a meeting between CSC and Terry Firman and Sylvie Séuin-Brant [sic] re who the Review Panel fell under and it was agreed that it fell under CSC ... unclear why file was not transferred at that point ... it is possible that the meeting took place after file was closed but there is no indication as to when the meeting was held ... Investigator asked if we would be willing to

transfer file to CSC out of a show of good faith ... spoke with Tony and said if we got the recommendation in writing to do so we would comply but not sure that CSC would be willing to have a closed file transferred to them. Left same message for investigator.

[Emphasis added.]

[21] Subsection 6(1) of the Regulations requires, as a condition to a valid transfer, that the government institution to which a transfer is directed consent to process the request. Since the ATIP Division considered transferring the request but determined that it was unclear whether CSC would, in fact, be willing to accept the transfer of a closed file, it was not an unreasonable exercise of discretion to conclude that the conditions for a transfer may not be met and to consequently decline to transfer the file on that basis. In the circumstances, on a careful review of the record, I find that the decision of the Department of Public Safety not to transfer the appellant's request for access is justified on a reasonableness standard of review.

[22] It is noteworthy that despite the length of time that has passed since the appellant filed his original request for access in June 2007, it remains open to the appellant to file a separate request to CSC for the requested documents.

[23] With respect to the appellant's argument regarding the duty to assist pursuant to subsection 4(2.1) of the ATIA, it is observed that this provision of the ATIA only came into force on September 1, 2007, several months after the appellant's request was refused. There is a well-established presumption that legislation is not meant to be applied retroactively unless such a construction is expressly or by necessary implication required by the language of the act (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at p. 279,

1975 CanLII 4 (SCC); see also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at p. 259). None of the parties argued or filed convincing evidence before this Court to rebut that presumption or otherwise suggest that subsection 4(2.1) of the ATIA has retroactive effect. Accordingly, I find that subsection 4(2.1) of the ATIA has no application in this appeal.

[24] Finally, the appellant's request that this Court re-instate the then Minister of Public Safety as a personally named party in this appeal is misplaced. As the Federal Court indicated, the individual is no longer in the position of Minister of Public Safety and would accordingly have no ability in his personal capacity to order the release of information sought by the appellant under the ATIA.

V. Conclusion

[25] I would dismiss the appeal. In view of the divided result, the parties should bear their own costs.

“Richard Boivin”

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
Donald J. Rennie J.A.”

Annex

Access to Information Act, R.S.C. 1985, c. A-1

Purpose

2 (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

...

Definitions

3 In this Act,

...

government institution means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act; (institution fédérale)

...

Right to access to records

4 (1) Subject to this Act, but notwithstanding any other Act of

Loi sur l'accès à l'information, L.R.C. 1985, c. A-1

Objet

2 (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[...]

Définitions

3 Les définitions qui suivent s'appliquent à la présente loi.

[...]

institution fédérale

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la Loi sur la gestion des finances publiques. (government institution)

[...]

Droit d'accès

4 (1) Sous réserve des autres dispositions de la présente loi mais

Parliament, every person who is

- (a) a Canadian citizen, or
- (b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

...

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

...

Request for access to record

6 A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

...

nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

- a) les citoyens canadiens;
- b) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

[...]

Responsable de l'institution fédérale

(2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

[...]

Demandes de communication

6 La demande de communication d'un document se fait par écrit auprès de l'institution fédérale dont relève le document; elle doit être rédigée en des termes suffisamment précis pour permettre à un fonctionnaire expérimenté de l'institution de trouver le document sans problèmes sérieux.

[...]

Transfer of request

8 (1) Where a government institution receives a request for access to a record under this Act and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, subject to such conditions as may be prescribed by regulation, within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

Deeming provision

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

Meaning of greater interest

(3) For the purpose of subsection (1), a government institution has a greater interest in a record if

(a) the record was originally produced in or for the institution;
or

(b) in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.

Transmission de la demande

8 (1) S'il juge que le document objet de la demande dont a été saisie son institution concerne davantage une autre institution fédérale, le responsable de l'institution saisie peut, aux conditions réglementaires éventuellement applicables, transmettre la demande, et, au besoin, le document, au responsable de l'autre institution. Le cas échéant, il effectue la transmission dans les quinze jours suivant la réception de la demande et en avise par écrit la personne qui l'a faite.

Départ du délai

(2) Dans le cas prévu au paragraphe (1), c'est la date de réception par l'institution fédérale saisie de la demande qui est prise en considération comme point de départ du délai mentionné à l'article 7.

Justification de la transmission

(3) La transmission visée au paragraphe (1) se justifie si l'autre institution :

a) est à l'origine du document, soit qu'elle l'ait préparé elle-même ou qu'il ait été d'abord préparé à son intention;

b) est la première institution fédérale à avoir reçu le document ou une copie de celui-ci, dans les cas où ce n'est pas une institution fédérale qui est à l'origine du document.

***Access to Information Regulations,
S.O.R./83-507***

Transfer of Request

6 (1) The head of a government institution may, within 15 days after a request for access to a record is received by the institution, transfer the request to another government institution as provided in subsection 8(1) of the Act, on condition that the head of the other government institution consents to process the request within the time limit set out for such a request in the Act.

(2) A request that has been transferred under subsection (1) shall not be transferred to a third government institution.

***Règlement sur l'accès à
l'information, DORS/83-507***

Transmission de la demande

6 (1) Le responsable d'une institution fédérale peut, dans les 15 jours suivant la réception d'une demande de communication d'un document, transmettre la demande à une autre institution fédérale conformément au paragraphe 8(1) de la Loi, si le responsable de l'autre institution fédérale consent à donner suite à la demande dans le délai prévu par la Loi.

(2) Une demande qui a été transmise en vertu du paragraphe (1) ne peut être transmise de nouveau à une troisième institution fédérale.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-139-17

STYLE OF CAUSE: MATTHEW G. YEAGER v.
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CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

DATED: APRIL 25, 2019

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