Federal Court  Cour fédérale

20171214

Docket: T-573-17

Citation: 2017 FC 1152

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MARGARET FRIESEN

Applicant

and

MINISTER OF HEALTH

Respondent

JUDGMENT AND REASONS

[1] This is an application by Margaret Friesen brought under section 41 of the *Access to Information Act* [Act], RSC, 1985, c A-1. Ms. Friesen is aggrieved by the failure of the Department of Health [Department] to produce certain documents she believes ought to have been produced in response to her January 2015 Access to Information request.

[2] The central focus of Ms. Friesen's Access to Information request concerned the testimony of an employee of the Department in a Quebec court proceeding. In particular, she wanted to see departmental records relevant to that testimony.

[3] Certain records were initially produced but Ms. Friesen was unsatisfied. She made a complaint to the Office of the Information Commissioner. In the course of the Commissioner's investigation, it was determined that relevant material might be found in Department of Justice files and a search was carried out. This resulted in a further disclosure of documents. Ms. Friesen remained dissatisfied and communicated again with the Department's Access to Information Privacy Division. This, in turn, resulted in a disclosure of three more documents that had been "inadvertently" omitted from the previous disclosure.

[4] On March 7, 2017, the Commissioner wrote to Ms. Friesen and informed her that, although the Department's efforts were initially deficient, it had rectified the lapses and "processed all responsive records". Her complaint was recorded as "well-founded and resolved".

[5] Ms. Friesen remained unconvinced that all of the relevant records had been produced to her and she brought this application.

[6] Although Ms. Friesen's application seeks relief in the form of "a full and thorough review of Health Canada's decision to deny the Applicant access to the requested records", her affidavit includes demands for explanations for the content of some of the documents she received.

[7] At the heart of Ms. Friesen's ongoing concern is a belief that other relevant documents must exist and that the Department's searches to date have been deficient. She is particularly concerned about the potential for "latent" records in digital form that, despite being electronically purged, might be forensically retrievable. Although she has no evidence or knowledge that such records do exist, she expressed the sentiment that it would be "highly unusual" or "rather odd" that they would not be available or accessible.

[8] On considering a section 41 application, the scope of this Court's jurisdiction must be recognized. It is only through the Act that this Court has any authority to compel the *per se* disclosure of government records. Section 41 provides the following:

Review by Federal Court	**Révision par la Cour fédérale**
41 Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	41 La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[9] The above provision must also be considered while having regard to section 49 of the Act, which states:

Order of Court where no authorization to refuse disclosure found 49 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines 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.	**Ordonnance de la Cour dans les cas où le refus n'est pas autorisé** 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 la présente loi 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.

[10] The above provisions have been repeatedly considered in this Court and by the Federal Court of Appeal. Without exception, those decisions have held that the Federal Court can only provide relief to an applicant where there has been an unlawful refusal to disclose an identified record. One of the clearest statements to this effect can be found in *Olumide v Canada (AG)*, 2016 FC 934, [2016] 6 CTC 1, where Prothonotary Mireille Tabib held:

> [18] To the extent the application is an application pursuant to s 41 of the *ATIA* for judicial review of the CRA's refusal to disclose the telephone records requested, I am satisfied that it is plain and obvious that it cannot succeed. Our Court has made it clear on a number of occasions that where, in response to a request for information (whether under the *ATIA* or the *Privacy Act*, RSC 1985 c P-21), a department responds that a record does not exist, such a response does not constitute a refusal of access. Absent a refusal, the Court does not have jurisdiction in judicial review pursuant to s 41 of the *ATIA* or the *Privacy Act*, unless there is some evidence, beyond mere suspicion, that records do exist and

> have been withheld. See *Clancy v Canada (Minister of Health)*, 2002 FCJ No 1825, *Wheaton v Canada Post Corp*, 2000 FCJ No 1127, *Doyle v Canada (Minister Human Resources Development)*, 2011 FC 471, *Blank v Canada (Minister Environment)*, 2000 FCJ No 1620.
>
> [19] As mentioned, it is plain that the "refusal" here is based on the CRA's conclusion that no records such as those requested exist, and the Information Commissioner's report of investigation agrees with that conclusion. No evidence, or even cogent argument, has been submitted by the Applicant to support a conclusion that the records exist or are being withheld. It is plain and obvious that this Court can have no jurisdiction in this matter pursuant to s 41 of the *ATIA*.

[11] More recently, in *Blank v Canada (Justice)*, 2016 FCA 189, [2016] FCJ No 694 (QL), the Federal Court of Appeal considered the issue of this Court's reviewing authority in connection with a demand that a further search for records be ordered. At paragraph 36, the Federal Court of Appeal held:

> [36] Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, <u>confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act</u>. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith. On the basis of the confidential record that is before me, I have been unable to find evidence that would lead me to believe, on reasonable grounds, that there has been any attempt to tamper with the integrity of the records. Accordingly, the Judge did not err in concluding that he lacked jurisdiction to order a further search of the records. [Emphasis added.]

Also see: *Blank v Canada (Justice)*, 2015 FC 956, [2015] FCJ No 949 (QL); *Connolly v Canada Post Corp*, 2002 FCA 50, [2002] FCJ No 185 (QL); and *X v Canada*, [1991] 1 FC 670, 41 FTR 73.

[12] All of these cases confirm that the Federal Court's authority under sections 41 and 49 of the Act does not include an order to compel a further search for unidentified documents or to explain the meaning or significance of records that have been disclosed. The Court also lacks the authority to consider the wisdom of government document retention policies. Finally, the Court's jurisdiction to order relief arises only where the head of a government institution or department refuses, without lawful justification, to produce a known record.

[13] In this case, there has been no refusal to disclose a known record. The Commissioner conducted an investigation and reasonably concluded that no responsive records were being withheld from Ms. Friesen. Ms. Friesen's concern about the potential existence of further records amounts to speculation which could only be remedied by an order compelling the Department to conduct a further search of its records – an authority this Court does not enjoy: see the Federal Court of Appeal decision in *Blank*, above, at para 36.

[14] In the result, this application is dismissed. I note the Minister's request for costs of $2,660.00. However, it does seem to me that the Commissioner's decision letter had the potential to mislead Ms. Friesen where it stated that an application to the Federal Court could be made to "review the Department's decision to deny you access to requested records". Here, there was no denial of access of the sort that could trigger judicial relief. The Commissioner

would be well advised to remove the highlighted statement from decisions of the sort made here where it is determined that all responsive records have been disclosed. That said, Ms. Friesen had an opportunity to reconsider the merits of her case upon receipt of the Minister's Memorandum of Fact and Law and the supporting legal authorities. She nevertheless pressed on with her application and was unsuccessful. I accordingly award costs to the Minister of $500.00.

JUDGMENT in T-573-17

THIS COURT'S JUDGMENT is that that application for judicial review is dismissed.

Costs are awarded to the Minister of Health in the amount of $500.00.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-573-17
STYLE OF CAUSE:	MARGARET FRIESEN v MINISTER OF HEALTH
PLACE OF HEARING:	WINNIPEG, MANITOBA
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DATED:	DECEMBER 14, 2017

APPEARANCES:

MARGARET FRIESEN	FOR THE APPLICANT (ON HER OWN BEHALF)
JOHN FAULHAMMER	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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