

Federal Court



Cour fédérale

Date: 20170203

Docket: DES-4-16

Citation: 2017 FC 78

Ottawa, Ontario, February 3, 2017

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AWSO PESHARY

Respondent

PUBLIC ORDER AND REASONS

(Top Secret Order and Reasons issued January 20, 2017)

I. Overview

[1] The Attorney General of Canada (AGC) has applied for an Order regarding disclosure of information that was the subject of three notices provided by counsel for the Public Prosecution Service of Canada. The AGC has not authorized disclosure of the information to the person affected, Mr Awso Peshdary, who is facing charges on terrorism offences. The position of the AGC is that revealing the information would harm national security, relying on the process and

powers set out in ss 38.01, 38.03 and 38.06 of the *Canada Evidence Act*, RSC 19085, c C-5. The AGC asks me to confirm the non-disclosure of the information in issue.

[2] To assist me in considering the ACG's request, I appointed Mr Ian Carter as *amicus curiae*. In addition, I held an *in camera* hearing at which a representative of the Canadian Security Intelligence Service testified and was cross-examined by Mr Carter. I then heard submissions from counsel for the AGC, Mr Andre Seguin, and Mr Carter on the questions of whether the non-disclosure was justified in the interests of national security, and whether the public interest in disclosure should supersede those interests. In particular, Mr Carter presented submissions in respect of the significance that some of information might have for Mr Peshdary's ability to make full answer and defence to the charges against him.

[3] Prior to the hearing, and even during it, Mr Seguin and Mr Carter agreed that some of the information clearly gave rise to national security concerns. In addition, Mr Seguin conceded that some redactions could now be lifted. Accordingly, there remain in issue only a few portions of two documents. The first (which I will refer to as Document 7) is a typed set of notes prepared by an officer of the RCMP during a meeting with a potential police agent named Abdullah Milton. Only two lines out of the four-page document are in issue. The second (Document 8) is a 251-page transcript of an interview with Mr Milton conducted by two RCMP officers. Several redactions are sought by the AGC, mainly on national security grounds.

[4] Given the agreement between Mr Seguin and Mr Carter in respect of the need to protect certain passages in the two documents in question, I need only address those where disclosure is

a real issue. I have summarized my conclusions in the attached Annex. The Annex sets out the redactions that I find must remain in place, the redactions that I find should be lifted (or that the AGC has agreed to lift), and the redactions that I find can be replaced with a summary or the contents of the redacted passages.

II. Legal Principles

[5] The first step is to consider the relevance of the information the AGC seeks to protect (*Canada (Attorney General) v Ribic*, 2003 FCA 246, at para 17). Here, I must consider the relevance of the information not just to Mr Peshdary's defence, but also in respect of his pending motion for production of records in the hands of CSIS.

[6] The second step to consider whether the AGC's claim of injury to national security is well-founded. The AGC's submissions must be given considerable weight and assessed on a standard of reasonableness (*Ribic*, at paras 18-19).

[7] The third step requires a balancing of the public interest in disclosure outweighs the interests in non-disclosure. Balancing requires consideration of a number of factors, including the nature of the public interest in issue, the value of the information to the defence, the seriousness of the charges involved, and the existence of other means to obtain the information (*Ribic*, at paras 21-22).

III. Conclusion and Disposition

[8] The undisclosed information appears generally to be relevant and related to national security concerns. The question, then, is how to balance those concerns against the public interest in disclosure.

[9] The information that the AGC says should not be disclosed relates primarily to methods and techniques used by the Canadian Security Intelligence Service in gathering intelligence. [REDACTED]. Disclosure of this information, according to the AGC, would reveal methods employed by the Service in carrying out its mandate to investigate threats to the security of Canada. Disclosure of those methods would impair the Service's ability to employ them.

[10] I will begin with the information the AGC agrees can now be disclosed. These relate to the initial contact between the Service and Mr Milton, and to the fact that Mr Milton made notes of this discussions with Mr Peshdary. These are addressed in the Annex below in two ways. In some cases, the full redaction has been lifted, with the note "AGC agrees to lift the redaction". In other cases, where the information to be disclosed appears alongside information that will remain undisclosed, I have provided a substitute for the redacted text.

[11] I have maintained the redactions that mostly clearly relate to unobvious Service methods and techniques, [REDACTED]. In these areas, the interest in confidentiality outweighed any public interest in disclosure. In particular, the value of this information to the defence seems minimal.

[12] Mr Carter was primarily concerned about information relating to a financial arrangement between the Service and Mr Milton. Mr Carter submitted that this information would be crucial to the defence in Mr Peshdary's trial and highly relevant to Mr Peshdary's application for production of third party records. The AGC essentially concedes that the fact there was a financial arrangement with Mr Milton can be disclosed. However, the AGC submits that the particulars of that arrangement should not be released. To do so would put the Service in a difficult position in relation to other sources, past, present and future, whether paid or unpaid. Further, it would amount to revealing techniques that the Service employs in its handling of sources.

[13] I am satisfied that the existence of a financial arrangement between the Service and Mr Milton is important information for the defence and should be disclosed. However, I am not persuaded, at this point in time, that further particulars are necessary. I will, therefore, preserve the redactions relating to those details, just as I have in respect of other details relating to the handling of sources.

[14] In respect of another subject area, Mr Carter asked for an opportunity to make further submissions if additional information comes to light by way of Mr Peshdary's application to obtain third party records from the Service. Indeed, there may be a need to come back before the Court at a later time, depending on the results of that application. Another s 38 proceeding may be required. If so, and if further submissions on some of the matters addressed in this proceeding would be appropriate in that context that would be the proper forum in which to make them.

[15] I have drafted these reasons with a view to making them public. However, I will permit the AGC a period of time to review them and advise me of any concerns about their public release.

ORDER in DES-4-16

THIS COURT ORDERS that:

1. The portions of Documents 7 and 8 identified in the attached Annex shall be disclosed, not disclosed, or substituted, as the case may be, in accordance with the conclusions set out therein.
2. Unless the Attorney General of Canada appeals this Order, disclosure may be made upon the expiry of the appeal period or upon the Attorney General of Canada deciding that no appeal will be brought.
3. The Attorney General of Canada shall advise the Court within five days of any concerns about releasing this Order and Reasons publicly. The *amicus* may make submissions in response within three days of receiving the Attorney General of Canada's submissions.

"James W. O'Reilly"

Judge

Annex

Redacted Text	Nature of the Security Claim	Conclusions
Document 7, p 3	[Redacted]	<i>Substitute:</i> “Agent obtains information from Peshdary and writes it down.”
Document 8, p 50, lines 27-29	[Redacted]	<i>Substitutes:</i> “The Service contacted me and asked to meet.”
Document 8, p 51, lines 1-4	[Redacted]	<i>Substitute:</i> “We met from time to time after that.”
Document 8, p 51 lines 10-11		AGC agrees to lift the redaction.
Document 8, p 56, lines 7-8	Reference to a financial arrangement	Redaction should be lifted.
Document 8, p 62, lines 25-26	[Redacted]	<i>Substitute:</i> “It was just, it was just simply goodbye.”
Document 8, p 66, lines 13-14		AGC agreed to lift the redaction.
Document 8, p 67, lines 7-8		AGC agrees to lift the redaction.
Document 8, p 70, lines 13-15	[Redacted]	<i>Substitute:</i> “I’ll write my notes.”
Document 8, p 70, lines 17-18	[Redacted]	<i>Substitute:</i> “Then I bring my notes.”
Document 8, p 70, lines 20-21	[Redacted]	<i>Substitute:</i> “And I show them my notes.”
Document 8, p 78, lines 17-19, 21-22, 27-28	[Redacted]	Non-disclosure confirmed.
Document 8, p 79, lines 3, 5-6, 8-9	[Redacted]	Non-disclosure confirmed.
Document 8, p 88, lines 15-16, 18, 20-21	[Redacted]	Non-disclosure confirmed.

Document 8, p 89, lines 9-11, 13-14, 16, 18-20	[Redacted]	Non-disclosure confirmed.
Document 8, p 96, line 30; p 97, lines 1, 3-4	[Redacted]	Non-disclosure confirmed.
Document 8, p 135, lines 26-27		AGC agrees to lift the redaction.
Document 8, p 140, lines 17, 19; p 141, line 1	[Redacted]	Non-disclosure confirmed.
Document 8, p 181, lines 4,10, 16	[Redacted]	Non-disclosure confirmed.
Document 8, p 185, lines 22-23	[Redacted]	Non-disclosure confirmed.
Document 8, p 187, lines 7-9, line 17	[Redacted]	Non-disclosure confirmed.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-4-16

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v AWSO
PESHADARY

**PLACE OF *IN CAMERA*
HEARING:** OTTAWA, ONTARIO

**DATE OF *IN CAMERA*
HEARING:** JANUARY 12, 2017

**TOP SECRET ORDER AND
REASONS:** O'REILLY J.

**TOP SECRET ORDER AND
REASONS ISSUED:** JANUARY 20, 2017

**PUBLIC ORDER AND
REASONS ISSUED:** FEBRUARY 3, 2017

APPEARANCES:

Mr. Andre Seguin
Mr. Marc Edmunds

FOR THE APPLICANT

Mr. Ian Carter

AMICUS CURIAE

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of
Canada
Ottawa, Ontario

FOR THE APPLICANT

Bayne, Sellar, Boxall
Barristers and Solicitors
Ottawa, Ontario

AMICUS CURIAE