Federal Court  Cour fédérale

Date: 20180409

Docket: T-379-17

Citation: 2018 FC 378

BETWEEN:

AIR CANADA and AIR CANADA ROUGE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. Introduction

[1] This is an application under s 44 of the *Access to Information Act*, RSC 1985, c A-1 [*ATIA* or Act] in respect of a decision [Decision] by Transport Canada [TC or Transport] to disclose certain information in two regulatory assessment reports prepared by officials at Transport.

[2] The Applicants claim that certain of the information is exempt from disclosure by reason of s 20(1)(b) (“commercial . . . or technical information”) and/or s 20(1)(c) (“material financial loss”). They also object to TC using s 20(6) (“public interest”) to justify disclosure.

[3] The parties, following the hearing, reviewed the disputed information and agreed to the s 19 personal information exemptions, but otherwise the bulk of the disputed information remained at issue. A confidential compilation was filed with the Court.

[4] As part of the hearing, the Court permitted limited portions of submissions to be confidential. The Court is of the view that these Reasons can be issued publicly as it is important for the public to understand the general context of the decision and the nature of the information in dispute. To the extent that the parties require further and confidential clarification, the Court remains available to address any remaining issues.

[5] The statutory provisions in issue from the *ATIA* are as follows:

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	**20 (1)** Le responsable d’une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
…	[…]

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

…

[…]

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

…

[…]

(6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if

(a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

(6) Le responsable d'une institution fédérale peut communiquer, en tout ou en partie, tout document qui contient les renseignements visés à l'un ou l'autre des alinéas (1)b) à d) pour des raisons d'intérêt public concernant la santé ou la sécurité publiques ou la protection de l'environnement; ces raisons doivent de plus justifier nettement les conséquences éventuelles de la communication pour un tiers : pertes ou profits financiers, atteintes à la sécurité de ses ouvrages, réseaux ou systèmes, atteintes à sa compétitivité ou entraves aux négociations — contractuelles ou autres — qu'il mène.

II. Background

A. *Reports – General*

[6] The Applicants, Air Canada [AC] and Air Canada Rouge [ACR], are Canadian airlines serving domestic, international, and trans-border markets. ACR is a wholly owned subsidiary of AC. Both are part of the Star Alliance network, a group of airlines which facilitate cooperation between members on such subjects as code-sharing, pricing, and other facilities and services.

[7] This litigation was precipitated by the following request [Request]:

> Could I please request the last assessment for the following Canadian air operators. Could you please task the relevant TC office for each airline (I believe the first seven are in HQ. I do not know exactly where the last 2 would be based out of, though, I know Porter flies primarily out of Toronto and Air Transat primarily out of Montreal): Air Canada, Air Canada rouge [*sic*], Air Transat, Jazz, Sunwing, WestJet, WestJet Encore, Porter Airlines, Air Transat.

[8] The documents TC identified as responsive to the Request pertain to the following surveillance reports conducted by TC inspectors – although as AC observed, the inspectors at site visits are not the authors of the reports, so their observations have been filtered through a bureaucracy lens:

1. National Operations Surveillance Report – Air Canada, dated September 30 to October 11, 2013 [Air Canada Surveillance Report]; and
2. National Operations Surveillance Report – Air Canada Rouge, dated June 2 to 13, 2014 [Rouge Surveillance Report].

[9] AC and ACR objected to the release of certain information in these reports which it sought to have redacted.

B. *Context of the Surveillance Reports*

[10] The two surveillance reports were produced by Transport Canada Civil Aviation [TCCA] which is charged with promoting the safety of the national air transportation system through its regulatory framework and oversight activities including through certifications, assessments, validations, inspections, and enforcement activities.

[11] As part of TCCA's oversight activities, inspectors conduct regulatory assessments of aviation operations to evaluate their effectiveness and compliance with the *Canadian Aviation Regulations*, SOR/96-433 [CARs]. TC staff inspect the safety management systems established by the airline pursuant to the CARs.

[12] A "safety management system" [SMS] is defined in s 101.01(1) of the CARs as being "a documented process for managing risks that integrates operations and technical systems with the management of financial and human resources to ensure aviation safety or the safety of the public."

[13] The Applicants emphasize the performance-based nature of the regulations pursuant to which an airline's SMS is inspected. These regulations allow review of compliance on a current as well as ongoing basis, and allow for the continuous implementation of improvements.

[14] Surveillance reports are produced pursuant to Staff Instruction (SI) SUR-001, Issue 05, 2013-06-28 – *Surveillance Procedures*. They contain an account of the TCCA inspection and summarize the results. Before a report is issued to the airline, it is submitted to TC's Surveillance Review Committee, which reviews and validates its content and findings. The report is then approved by the Convening Authority, who oversees and is responsible for the conduct of surveillance activity, and sent to the airline for its review, comments, and action. The Applicants describe this as a cooperative process between the airline and the regulator, but it is a compulsory process.

[15] The Applicants note that the inspectors who conduct site visits are not the authors of the surveillance reports, which they say contributes to the potential for inaccurate, misleading, and prejudicial statements in surveillance reports, and highlight that the Auditor General has stated that TC inspectors carrying out surveillance activities do not receive adequate training.

[16] The ongoing nature and the goal of seeking out continuous improvements means that the process, by its nature, must find areas for comment. Since perfection is not practically attainable, these reports will always find areas of concern – most minor in nature. An objective view of the comments shows to even the non-technical person (such as a judge) that the comments are designed to foster improvements, seldom really adverse, and often bureaucratic in tone and style.

C. *Content of the Surveillance Reports*

[17] The Air Canada Surveillance Report identified 12 findings, classified as minor or moderate, where the airline was not compliant with regulatory requirements. TCCA found that a corrective action plan [CAP] was appropriate.

[18] AC objected in writing to several of the findings in the Air Canada Surveillance Report, but TCCA did not alter the report. AC submitted a CAP for each finding and TCCA later confirmed that all 12 of the findings had been addressed and that surveillance activity was now closed. One could not fairly read the CAP as an admission of fault, neglect, or disregard for safety.

[19] The Rouge Surveillance Report identified 22 findings which were classified as minor, moderate, or major, and indicated that each finding was to be addressed through a CAP. ACR expressed concerns in its CAP with the assessment process and specific findings, and while TCCA's response noted the issues, the report was not altered. TCCA subsequently accepted ACR's CAPs for each finding and the assessment was closed. Again, one could not fairly read the CAPs as an admission of fault, neglect, or disregard for safety.

[20] Importantly, no enforcement action was taken against either airline, which is reserved for more severe regulatory infringements.

D. *Impugned Decision*

[21] In a letter dated February 21, 2017, TC advised the Applicants that the Air Canada Surveillance Report would be released in full and that the Rouge Surveillance Report was partially redacted pursuant to s 20(1)(b) of the *ATIA*.

[22] TC stated that it considered *Porter Airlines Inc v Canada (Attorney General)*, 2014 FC 392, 453 FTR 221 [*Porter*], where Justice Rennie distinguished between the SMS information of an air operator and TC's regulatory conclusions. SMS information should be exempt from disclosure pursuant to s 20(1)(b), but regulatory conclusions did not meet the exemption's criteria. TC also noted that Justice Rennie found that there was insufficient evidence that public misunderstanding of the disclosed information would inflict harm to Porter Airlines under s 20(1)(c).

[23] The Decision found as follows regarding the reports:

- Executive Summary – this was made up of observations and conclusions made by TC staff, which is regulatory assessment information that should be released to the public.
- Statement of Compliance – this formed TC's conclusions as to whether the Applicants met the minimum regulatory requirements. Disclosure was supported by para 95 of *Porter* that "[t]he Act was not meant to prevent from disclosure regulatory conclusions made by various government agencies."

- Compliance Summary – this summary statement cites from TC's SMS Assessment Guide, which sets out the component elements assessed. Section 20(1)(b) is not applicable as these observations were not received by the third party, and s 20(1)(c) is not applicable as the argument that the information may be misunderstood or misused by the public does not justify the exemption.
- Classification of the Findings – these are regulatory conclusions that do not meet the s 20(1)(b) criteria, as they were not provided by a third party nor are they confidential.

[24] The Decision also found that disclosing the Statement of Compliance and the Classification of Findings was in accordance with s 20(6) of the *ATIA*, since it would be in the public interest as the surveillance reports relate to public safety pursuant to TC's regulatory mandate, and the public interest in disclosure outweighs the prejudice to a third party.

III. Issues

[25] The issues are as follows:

1. Is certain information in the surveillance reports exempted from disclosure on the basis of s 20(1)(c)?
2. Is certain information in the surveillance reports exempted from disclosure on the basis of s 20(1)(b)?
3. Should certain information in the surveillance reports be disclosed pursuant to s 20(6)?

IV. Analysis

A. *Standard of Review*

[26] The parties agree that the standard of review to determine whether information is exempt from disclosure under s 20(1) of the *ATIA* is correctness, as was stated in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53, [2012] 1 SCR 23 [*Merck*]:

> There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 19; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 22. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure: see, e.g., *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at pp. 265-66; *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2003 FC 1422 (CanLII), at para. 3; *Dagg*, at para. 107. The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.
>
> [Emphasis added.]

B. *Section 20(1)(c) Information*

[27] As the Applicants argued and with which I agree, s 20(1)(c) is the most important provision governing this litigation.

The real concern is that the words used are often not necessary to carry out the regulatory function, are often inaccurate, and can therefore lead to harm.

[28] This is not the first case where the issue of harm arising from disclosure of TC reports on various airlines has been litigated. The leading case of *Air Atonabee Ltd v Canada (Minister of Transport)*, 27 FTR 194, 1989 CarswellNat 585 (WL Can) (FCTD) [*Air Atonabee* cited to WL Can], is still good law in principle. It speaks to many of the issues raised by the Applicants.

[29] In discussing the arguments against disclosure, Justice MacKay stated as follows in *Air Atonabee*:

> 57 Here the applicant submits that the information proposed to be released is likely to be misunderstood by the general public for it is highly technical in nature and it is incomplete for it is only selected parts of an ongoing process of communications, a dialogue, between the parties. It is said that the information proposed to be released does not provide appropriate contextual or explanatory background to be properly understood. The applicant objects to a brief explanatory note proposed by the respondent to be disclosed with the records and submits that only by providing even more information of the same sort which would contain matters the applicant considers confidential would its position be fairly presented in relation to some of the records. Many of the records relate to matters arising in the inspection process which involves not mere supervision and enforcement but service and a sharing of information in a regime where both parties have different but shared responsibilities for overall safety in operations. While the applicant has indicated throughout that it does not consider that any of the records, properly understood in context,

> raise issues of safety in its operations, it is concerned that the opposite will appear to be the case to the uninformed reader.
>
> . . .
>
> 58 The applicant's apprehension gives rise to three serious concerns. First, it is urged that there is a reasonable expectation of harm to the applicant, with a smaller and still developing operation in a highly competitive industry and serving a highly competitive market, where a modest decline in passenger traffic, a mere one percent, would have serious financial implications for the company.
>
> . . .
>
> 63 It is true that the records arise from inspection of operations by the government agency with responsibility for safety standards in air transport and that if disclosed the records will not provide a complete picture. The accurate picture is, of course, the applicant's apparent record for safety in its operations, which the respondent acknowledges and which is evident from its continuing operation under license without any major safety incident. The public view of the applicant's concern for safety in its operations depends ultimately on its own performance, not upon the results recorded in routine inspection. Moreover, if disclosure of records were to lead to any general public misunderstanding about safety in operations the respondent will have some responsibility to react to that, otherwise the inspection system itself may be discredited in the long run.

[30] Justice MacKay also stated at para 64 that a reasonable expectation of harm does not arise in the context of a possible general misunderstanding of the content of the disclosure.

[31] Even the Respondent recognizes that some aspects of the report could cause the public to be concerned about aviation safety and that there may be some impact on competition. However, the potential for a lack of understanding and possible misinterpretations are not, *per se*, sufficient to withhold disclosure. As the Supreme Court noted in *Merck*, at para 224, it would be an

unusual case where an exemption from disclosure could be justified on the basis of the potential for inaccurate perception.

[32] Some of the potential for misunderstanding can be ameliorated by the very kind of explanation and context found in the Applicants' Memorandum of Fact and Law. One would expect a responsible organization such as TC to be prepared to issue an explanatory note upon release of the information. If it cannot or will not, the parties may make submissions before the Court issues its final order.

[33] In addition to the prospect of some harm, the Applicants' expert, Dr. Tretheway, a well-regarded expert in aviation and economic matters, opined on the high level of competition in the industry. He also provided helpful context about current channels for the distribution of information (sometimes called the "Twitterverse") that increase the likelihood for the misunderstanding and misuse of technical information regarding airlines by people who have minimal understanding of the real import of the comments. His evidence was unchallenged.

[34] The Applicants have established a reasonable expectation of some harm from the disclosure of these records.

What it has not done is establish that, as required by s 20(1)(c), such harm would likely be material.

[35] Given that the Applicants' expert has expertise in aviation competition and economics, the absence of even some "ballpark" quantification, even in principle, was significant. Airlines

have had negative disclosures in the past – there are several cited decisions on this industry – and yet, with all the sophistication of a modern international carrier, there was no evidence of the level of harm anticipated.

[36] In *Astrazeneca Canada Inc v Canada (Minister of Health)*, 2005 FC 189, 275 FTR 133, this Court addressed the necessity of establishing some objective basis for a finding of material harm:

> [46] Recognizing the inherently speculative nature of proof of harm does not however relieve a party from putting forward something more than internally held beliefs and fears. Evidence of reasonably expected results, like forecasting evidence, is not unknown to courts and there must be a logical and compelling basis for accepting the forecast. Evidence of past documents of information, expert evidence, evidence of treatment of similar evidence or similar situations is frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

[37] Therefore, the Court concludes that the Applicants have not established a s 20(1)(c) exemption from disclosure. The Respondent's reliance on *Porter* and whether it was properly applied by TC is of no consequence. The Court does recognize that *Porter*, particularly the parts relied upon, was more focused on s 20(1)(b) than on (c).

C. *Section 20(1)(b) Information*

[38] There are few references under this head of exemption. Those references which were observations by TC inspectors further to their regulatory assessment activity are not exempt. Since as early as *Canada Packers Inc v Canada (Minister of Agriculture)* (1988), [1989] 1 FC

47, 26 CPR (3d) 407 (FCA), such regulatory observations, even if unfair or inaccurate, did not fall within s 20(1)(b).

[39] The parties appear to agree that certain information regarding employees in Maintenance Stores is exempt as technical information supplied to TC in confidence and maintained as such. I concur with that position.

D. *Section 20(6) Disclosure*

[40] Section 20(6) is not properly before the Court. TC did not rely on that provision to justify disclosure and therefore there is nothing under this provision to be reviewed by the Court.

[41] Section 20(6) only becomes relevant where the government finds that information is exempt but that under s 20(6), it should nevertheless be disclosed in the public interest.

None of the information at issue in this case was found exempt from disclosure, so even the first step for the application of s 20(6) was not met.

V. Conclusion

[42] Therefore, this Court will, upon hearing further from the parties as to an explanatory note, and on whether any part of these Reasons discloses information which ought not to be disclosed and any other matter pertinent to a final order, dismiss this application with costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
April 9, 2018

FEDERAL COURT

SOLICITORS OF RECORD

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