Federal Court  Cour fédérale

Date: 20200604

Docket: T-2005-19

Citation: 2020 FC 667

Ottawa, Ontario, June 4, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

JAMIE J. GREGORY

Applicant (Responding Party)

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARDNESS

Respondent (Moving Party)

ORDER AND REASONS

I. Opening Observations

[1] The Applicant (Mr. Gregory) seeks judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the refusal by the Access to Information and Privacy ("ATIP") Branch of the Royal Canadian Mounted Police ("ATIP Branch of the RCMP") for access to information sought. The Respondent brings the within motion in which it requests the Application be converted to one under section 41 of the *Privacy Act*, RSC 1985, c P-21; and, if

so converted, that it be struck as being bereft of any chance of success. Failing the striking of the Application, the Respondent asks that it be afforded an extension of time within which to file affidavit evidence. For the reasons set out below, I conclude the Application should be converted to one under the *Privacy Act*, that the Application is not bereft of any chance of success and that the Respondent will be accorded an extension of time within which to file affidavit evidence.

II. Background

[2] In 2008, Mr. Gregory was convicted of second-degree murder as a result of an incident that occurred in Nova Scotia in December of 2006. He was sentenced to life imprisonment with no chance of parole for 10 years. At this time, he remains in prison, having served in excess of 13 years. At the time of his trial he believed, and continues to believe, that his defence counsel did not have full disclosure of all information available to police investigators and prosecutorial officials. He asserts that, if all information had been made available, he would have been convicted of manslaughter rather than murder. That said, his appeal to the Nova Scotia Court of Appeal was unsuccessful, as were his efforts to appeal to the Supreme Court of Canada.

[3] A previous ATIP request submitted by Mr. Gregory to the RCMP in May 2016 was resolved in 2018.

[4] On November 26, 2018, Mr. Gregory made a second request to the ATIP Branch of the RCMP for access to information. In this latest correspondence, Mr. Gregory did not specify whether the request was being made under the *Access to Information Act*, RSC 1985, c A-1 or the *Privacy Act*. The ATIP Branch acknowledged receipt of the request on December 5, 2018

and considered it as having been filed under section 12 of the *Privacy Act*. On this occasion, Mr. Gregory sought access to video surveillance footage of December 22, 2006 (the date of the murder for which he was convicted) from the Capitol Lounge in Middleton, Nova Scotia (the place of the murder). In his formal request, Mr. Gregory set out the steps he had taken to ensure the existence of the surveillance footage, the fact cameras had been operating on the date in question and the fact that the RCMP had access to those tapes. Mr. Gregory wrote follow-up letters to the ATIP Branch of the RCMP on June 3, July 10, and July 31, 2019. Having received no reply to his request, Mr. Gregory filed a formal complaint with the Office of the Privacy Commissioner of Canada ("the Commissioner") on July 31, 2019. In that three and-a-half page letter, Mr. Gregory provided numerous details about the information he sought and the fact the ATIP Branch of the RCMP had not responded to him. The Commissioner received the July 31 correspondence on August 6, 2019 and responded, in part, as follows:

> 2019-08-20
>
> Dear Jamie J. Gregory
>
> I am writing as a follow-up to your correspondence received on 2019-08-06 with regard to the matter you brought to the attention of the Privacy Commissioner of Canada. You have explained that the Royal Canadian Mounted Police (RCMP) failed to respond to your access request under the *Privacy Act* within the legislated time limits.
>
> A complaint file has been opened and it has been assigned to me. I have notified the institution of the details of your complaint and have asked that it provide me with a copy of the information from its files related to your access request. After I receive this information, I will make every effort to complete the investigation as soon as possible.
>
> Under subsection 33(2) of the Privacy Act, you have the right to make further representations to the Privacy Commissioner before a finding is made in this matter. What this simply means is that you may, at any time prior to the completion of this investigation,

> provide to me any additional information or comments which you feel are relevant to your complaint.
>
> Therefore, should you have any additional information or wish an update on my investigation, please do not hesitate to contact me at the coordinates indicated below.
>
> Sincerely,

[5] On October 31, 2019, the Commissioner informed Mr. Gregory it had completed its investigation and concluded his complaint was well-founded. The letter reads in part:

> Dear Jamie J. Gregory:
>
> This letter is to report our findings following the investigation of the Office of the Privacy Commissioner of Canada regarding your complaint against the Royal Canadian Mounted Police ("RCMP").
>
> […]
>
> Our investigation revealed that:
>
> The RCMP received your access request on 2018-12-05 (RCMP file P-2018-09878). As of the date of this letter, you have yet to receive a response to your request.
>
> […]
>
> In the context of this complaint, the RCMP has exceeded the time limit and failed to respond to your request. Therefore, we have concluded that your complaint is **well-founded** and have closed our file. (The highlighting is in the original.)
>
> Section 41 of the Act provides a right to apply to the Federal Court of Canada for review of the decision of a government institution to refuse to provide access to personal information. A section 41 application is not a review of the Privacy Commissioner's report. Rather, it is a determination of whether the government institution respected the provisions of the *Act* in refusing to disclose personal information. Such an application must be filed with the Court within 45 days of receiving this letter [...]
>
> […]
>
> Sincerely,

[6] On December 13, 2019, Mr. Gregory filed an Application for Judicial Review pursuant to sections 18 and 18.1 of the *Federal Courts Act* of the refusal by the ATIP Branch of the RCMP for access to the information sought. To be clear, Mr. Gregory's Application for Judicial Review relates to the RCMP's refusal to disclose the information sought.

[7] On January 15, 2020 – more than two (2) years after his request for access to information, two and a half months following the report by the Commissioner that his complaint was well-founded, and approximately one (1) month after he had filed and served the within Application for Judicial Review – Mr. Gregory received a response from the ATIP Branch of the RCMP, in which it claimed an exemption from release of the information sought. That response reads, in part:

> Based on the information provided, a search for records was conducted in Nova Scotia. Please be advised that a review of the records located reveals that all of the information you have requested qualifies for an exemption pursuant to subparagraph 22(1)(*a*)(i) of the Act, a description of which can be found at http:laws-lois.justice.gc.ca/eng/acts/P-21.

[8] For ease of reference, subparagraph 22(1)(*a*)(i) of the *Privacy Act* is set out below:

Privacy Act (RSC 1985, c P-21)	***Loi sur la protection des renseignements personnels*** (LRC 1985, ch P-21)
Law Enforcement and investigation	**Enquêtes**
22(1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)	22 (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :

(a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to	a) soit qui remontent à moins de vingt ans lors de la demande et qui ont été obtenus ou préparés par une institution fédérale, ou par une subdivision d'une institution, qui constitue un organisme d'enquête déterminé par règlement, au cours d'enquêtes licites ayant trait :
(i) the detection, prevention or suppression of crime,	(i) à la détection, la prévention et la répression du crime

[9] Interestingly, that letter does not reveal whether the RCMP located the surveillance footage sought by Mr. Gregory, nor does it indicate whether that footage ever existed or continues to exist.

III. Analysis

A. *Should the Notice of Application brought under sections 18 and 18.1 of the Federal Courts Act be struck without leave to amend; or, in the alternative, should the Application be converted to a section 41 proceeding under the Privacy Act?*

[10] Section 41 of the *Privacy Act* reads as follows:

Review by Federal Court where access refused	**Révision par la Cour fédérale dans les cas de refus de communication**
41 Any individual who has been refused access to personal information requested under subsection	41 L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du

12(1) may, if a complaint has been made to the Privacy 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 Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(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.

[11] Given the provisions of section 18.5 of the *Federal Courts Act*, I am of the view the within Application should have been brought under section 41 of the *Privacy Act* and not section 18 or 18.1 of the *Federal Courts Act*. A review mechanism exists under the *Privacy Act*: *Canada Post Corporation v Canada (Minister of Public Works)* (1993), 68 FTR 235, 21 Admin LR (2d) 152; *Gardiner v Canada (Attorney General)*, 2004 FC 483, 250 FTR 131. In the result, the Respondent's request to convert the Application to one under the *Privacy Act* will be granted.

B. *Should the Application under the Privacy Act be struck as being "bereft of any chance of success"?*

[12] The Respondent contends the Federal Court is without jurisdiction to consider the within Application because the pre-condition of a complaint to the Commissioner into the claim for an exemption has not yet been undertaken. He bases his position on the assertion that "there has been no report from the OPC ["Commissioner" in these reasons] on exemptions complaint, an application as it related to improperly applied exemptions would be premature here". I

respectfully disagree with the Respondent's contention for two (2) reasons. First, I am satisfied the three pre-conditions for the Federal Court to exercise its jurisdiction under section 41 of the *Privacy Act* have been met in the present case, namely a refusal occurred, Mr. Gregory complained to the Commissioner about the refusal, and the Commissioner filed a report about that refusal. Second, there was no valid and proper exemption claim made by the ATIP Branch of the RCMP about which Mr. Gregory could legitimately complain to the Commissioner, hence the Commissioner would lack jurisdiction to consider any exemptions.

> (1) The prerequisites to a judicial review application were present in the circumstances: namely there was a refusal, a complaint about the refusal, and an investigation and a report by the Privacy Commissioner about that refusal

[13] The Federal Court's jurisdiction to consider a refusal for access to personal information is set out in section 41 of the *Privacy Act*. In *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315, 326 DLR (4th) 228 [*Statham*], the Federal Court of Appeal considered the parallel section under the *Access to Information Act* and set out three (3) prerequisites before an access requestor may apply to the Federal Court for judicial review. They are:

1. The applicant must have been refused access to a requested record;
2. The applicant must have complained to the Commissioner about the refusal;
3. The applicant must have received a report of the Commissioner under subsection 37(2) of the Act.

While *Statham* involved the *Access to Information Act*, I conclude the jurisprudence applicable to the complaint process under that act applies equally to that under the *Privacy Act* (*Leahy v*

Canada (Citizenship and Immigration), 2012 FCA 227 at para 68, 47 Admin LR (5th) 1; *Cumming v Canada (Royal Mounted Police)*, 2020 FC 271 at para 30 [*Cumming*]).

[14] The first precondition was met in this case as soon as the ATIP Branch of the RCMP was deemed to have refused access to the requested records. Pursuant to section 14 of the *Privacy Act*, the head of a government institution must, within 30 days, provide a response to a request for access to personal information or provide access to the information sought. That same head of an institution is permitted, under section 15 of the *Privacy Act*, to extend the period for a maximum of thirty days if "meeting the original time limit would unreasonably interfere with the operations of the government institution" or if "consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit". In addition, the head of the institution may extend the time limit for "such period of time as is reasonable, if additional time is necessary for translation purposes or for the purposes of converting the personal information into an alternative format". Notices of any extensions and their length must be provided to the individual. In the present case, the ATIP Branch of the RCMP did not respond within the time-frame as required by law, nor did it provide, as required by law, a notice to Mr. Gregory that the response period would be extended. Subsection 16(3) of the *Privacy Act* provides that failure to respond within the timeframes or extensions set out in that *Act* results in a deemed refusal to provide the information sought.

[15] The Commissioner plays no role in determining whether there has been a deemed refusal. A refusal results by operation of law – not by any declaration or pronouncement by the Commissioner. A deemed refusal is an event which arises upon the passage of time as set out in

subsection 16(3) of the *Privacy Act*. In *Canada (Information Commissioner) v Canada (Minister of National Revenue)* (1999), 240 NR 244 (FCA) [*Canada (Minister of National Revenue)*], the Court considered the deemed refusal provision of the *Access to Information Act*. In a *per curiam* decision the Court stated, in part:

> Under the terms of subsection 10(3) of the *Act*, where a government institution fails to give access to a record within the time limits set out in the *Act*, there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of section 7 and subsection 10(1) of the *Act*. (para. 19)

In *Statham*, the Court cited *Canada (Minister of National Revenue)* when it concluded that it is "settled law that no distinction exists between a "true refusal" and a deemed refusal of access". As mentioned, the jurisprudence applicable to subsection 10(3) of the *Access to Information Act* applies equally to subsection 16(3) of the *Privacy Act*. For ease of reference, subsection 10(3) of the *Access to Information Act* and subsection 16(3) of the *Privacy Act* are set out below:

***Access to Information Act* (R.S.C., 1985, c. A-1)**	***Privacy Act* (R.S.C., 1985, c. P-21**
Where access is refused	**Where access is refused**
10 (1) Where the head of a government institution refuses to give access to a record requested under this Part or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)	16 (1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(a)
[…]	[…]
Deemed refusal to give access	Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Part or a part thereof within the time limits set out in this Part, the head of the institution shall, for the purposes of this Part, be deemed to have refused to give access.

(3) Where the head of a government institution fails to give access to any personal information requested under subsection 12(1) within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Loi sur l'accès à l'information **(L.R.C. (1985), ch. A-1)**

Loi sur la protection des renseignements personnels **(L.R.C. (1985), ch. P-21)**

Refus de communication

10 (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente partie, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

Refus de communication

16 (1) En cas de refus de communication de renseignements personnels demandés en vertu du paragraphe 12(1), l'avis prévu à l'alinéa 14a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à la protection de la vie privée et, d'autre part :

[…]

[…]

Présomption de refus

(3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente partie vaut décision de refus de communication.

Présomption de refus

(3) Le défaut de communication de renseignements personnels demandés en vertu du paragraphe 12(1) dans les délais prévus par la présente loi vaut décision de refus de communication.

Once a deemed refusal occurred in the circumstances, there was nothing for the Commissioner to investigate in that regard. The Commissioner could do nothing to alter the fact that a refusal had taken place. It follows that the first pre-condition to Mr. Gregory's access to the Federal Court occurred in the circumstances: the institution refused Mr. Gregory access to the personal information requested.

[16] I now turn to the second pre-condition for access to the Federal Court; namely, that "a complaint has been made to the Privacy Commissioner in respect of the refusal". Mr. Gregory complained to the Privacy Commissioner of the institution's refusal to provide access to the information in a letter dated July 31, 2019. The second pre-condition was satisfied.

[17] I now turn to the third pre-condition for access to the Federal Court; namely, that the applicant have received a report of the Commissioner under subsection 37(2) of the *Privacy Act*. This pre-condition has also been satisfied: Mr. Gregory complained about the institution's refusal to provide access, and the Commissioner issued a report concerning the refusal. The July 31, 2019 letter from Mr. Gregory to the Commissioner is much more than a letter asking the Commissioner to confirm that the ATIP Branch of the RCMP failed to respect the time limits set out in the *Privacy Act*. Mr. Gregory effectively acknowledges that his request for access has been refused. He writes for three and a half pages about his efforts to secure information relevant to his defence. He provides the name of the woman who confirmed the video was operational on the relevant date and the fact the video cassettes were placed in a plastic bag by the RCMP. He specifically informs the Commissioner that he (Mr. Gregory) is anxious "to see what this office

is prepared to do to force the release of this material". Very importantly, Mr. Gregory states, in part, in his letter of complaint that:

> I am at this moment seeking the assistance and cooperation of the Office of the Privacy Commissioner of Canada, to force the release of this material, and ordering a complete review of all of the material collected by the RCMP during their investigation.

[18] It is that July 31, 2019 letter of complaint that the Commissioner responded to on October 31, 2019. At the outset of his letter, the Commissioner informed Mr. Gregory its purpose was to "report our findings following the investigation of the Office of the Privacy Commissioner regarding your complaint against the Royal Canadian Mounted Police". In that Report, the Commissioner referred to Mr. Gregory's request for access to information received by the ATIP Branch of the RCMP on December 5, 2018; the complaint to his office received on August 6, 2019; the fact Mr. Gregory had received no response; and the fact access was refused by operation of law. Ultimately, it concluded the complaint was well-founded. The Commissioner's report exceeds a page and invites Mr. Gregory to seek judicial review of the institution's (ATIP Branch of the RCMP) decision "to refuse to provide access to personal information".

[19] I am of the view the three pre-conditions to access to the Federal Court have been met. A deemed refusal occurred, Mr. Gregory complained to the Commissioner that his request for access had been refused, and the Commissioner investigated and concluded the complaint about the refusal was well-founded. Mr. Gregory has cleared all hurdles for access to the courts.

(2) There was no valid and proper exemption claim made by the ATIP Branch of the RCMP under paragraph 22(1)(*a*)(i) about which Mr. Gregory could legitimately complain to the Commissioner

[20] The Respondent cites *Statham* and *Frezza v Canada (National Defence)*, 2014 FC 32, 445 FTR 299 [*Frezza*] to support its contention that Mr. Gregory cannot access the courts until such time as he has complained about the exemption claim made by the ATIP Branch of the RCMP and the Commissioner has investigated that complaint. I disagree with that contention.

[21] In *Statham*, the claimant requested access to 389 records held by the Canadian Broadcasting Corporation. The Federal Court of Appeal concluded the judicial review was rendered moot by the delivery of all documents prior to the hearing by the Federal Court. *Statham* can be distinguished from the present case because in *Statham*, the institution (Canadian Broadcasting Corporation) had not claimed any exemptions. The Court was not called upon to consider any exemptions, whether they be timely or untimely.

[22] *Frezza* concerned a complaint, investigation and eventual judicial review application under the *Privacy Act.* It was a case in which the institution, the Minister of National Defence, had claimed some exemptions. However, four (4) points must be made regarding the exemption claims which distinguish *Frezza* from the present case. First, the exemptions were claimed within the time limits prescribed. Second, there was no deemed refusal under the *Privacy Act* regarding any of the exemptions claimed. Third, having been made in a timely manner, the exemption claims were investigated by the Commissioner. Finally, by the time the matter came on for hearing before the Federal Court, the Minister of National Defence had abandoned his claim of exemptions. As in *Statham*, the matter had become moot. In the opening lines of his analysis at paragraph 51, Justice Russell described the issue which then presented itself:

> By the time this application came on for review before me on September 30, 2013, events had overtaken the original grounds for

> bringing the application. In effect, Mr. Frezza has received the information he was originally seeking under his section 41 application, and he readily conceded that his application was moot.

[23] Similar to my observations in *Statham*, I find the facts in *Frezza* differ sufficiently from the facts in the present case such that it offers little jurisprudential support for the position advanced by the Respondent. Nothing in *Statham* or *Frezza* supports the proposition that following a refusal to disclose, the Commissioner must first deal with untimely claims for exemptions before the courts are clothed with jurisdiction.

[24] The Respondent also relies upon the decision of this Court in *Sheldon v Canada (Health)*, 2015 FC 1385 [*Sheldon*]. *Sheldon* concerned the *Access to Information Act*. Mr. Sheldon had filed a complaint relating to the failure by the Minster of Health to respect the timelines set out in the statute and had received a report confirming those timelines had not been respected. He filed an application in the Federal Court seeking an order that Health Canada release the requested records. Similar to the present case, not until after the filing of an Application for Judicial Review did Health Canada claim any exemptions. As an aside, I note that following the filing of the Application in *Sheldon*, Health Canada released some of the information sought. The trial judge concluded the Commissioner had not investigated and reported on the exemptions claimed and that the Federal Court was therefore without jurisdiction to hear the matter. Justice Leblanc of this Court, as he then was, stated:

> According to the mechanics of the regime established by the Act, the Applicant's demand for an order enjoining Health Canada to disclose an unredacted version of the requested records is therefore premature. In a review proceeding initiated under section 41 of the Act on the basis of a deemed refusal, the Court cannot rule upon the application of any exemption for exclusion claimed under the

> Act if the Commissioner has no investigated and reported on the claim to the exemption or exclusion. (at para 22).

[25] In reaching this conclusion, Justice Leblanc cites *Statham* at para 55; *Whitty v Canada (Attorney General)*, 2014 FCA 30 at paras 8 and 9, 460 NR 372 [*Whitty*]; and *Lukács v Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267 at para 31, 1 Admin LR (6th) 1 [*Lukács*]. With respect, I am not convinced the law is as clear as asserted by the Court in *Sheldon.* I make this observation based upon the manner in which I have distinguished *Statham* from the present case, and a careful reading of the decisions in *Whitty* and *Lukács*.

[26] *Whitty* may be distinguished from the facts of the present case on several bases. First, in *Whitty*, although exemptions were claimed after the passage of the statutory time limit to furnish a response, they were claimed before the Information Commissioner had issued his report. Importantly, in the present case, unlike in *Whitty*, the institution claimed exemptions *after* the issuance of the report and even *after* the filing of the Application for Judicial Review. Second, in *Whitty*, although the information requestor filed several complaints, this Court found as a fact that the judicial review application related only to the first complaint. That complaint pertained uniquely to the institution's lack of a timely response. It was not about the refusal to provide the information. Mr. Gregory's case differs in that he clearly complained about the failure to provide the information requested.

[27] I would also note that in *Whitty*, the Federal Court of Appeal, under the pen of Justice Stratas, was careful to point out that the Federal Court's characterization of an Application for Judicial Review is a factual matter and, hence, may only be vitiated by palpable and overriding

error: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. In contrast to *Whitty*, it is abundantly clear that Mr. Gregory's complaint was about the refusal of the ATIP Branch of the RCMP to provide the requested information. Mr. Gregory sought more from the Commissioner than confirmation of a missed time limit.

[28] *Lukács* may also be distinguished based on the fact the exemptions were claimed before the Information Commissioner's report was issued. In my view, the decision of Justice Mactavish of this Court (as she then was) in *Lukács* supports the position advanced by Mr. Gregory. In *Lukács*, the information requestor argued that the institution should not be permitted to alter the exemption grounds for refusing access, relying upon *Davidson v Canada (Solicitor General)*, [1989] 2 FC 341, 61 DLR (4th) 342 [*Davidson*]. Justice Mactavish concluded the institution had the power to amend its grounds for refusing access, because it had done so prior to the issuance of the report by the Information Commissioner. Justice Mactavish distinguished *Davidson* because the institution, in that case, only asserted the amended grounds *after* the Privacy Commissioner's report.

[29] Justice Mactavish left no room for doubt about her position when, at paragraph 46, she observed that "[t]he jurisprudence has, moreover, established that a government institution can indeed amend the grounds asserted for denying access if it does so *before* the [Information Commissioner] has reported in relation to an access complaint" (italics in the original), citing *Tolmie v Canada (Attorney General)*, [1997] 3 FC 893, 137 FTR 309.

[30] Neither party cited *Cumming*, *supra* at para 13. However, with respect, I consider *Cumming* constitutes an erroneous application of the jurisprudence set out in *Statham*, *Whitty* and *Lukács*, given its reliance on *Sheldon*.

[31] Given the facts of this case, which distinguish it from the cases cited by the Respondent, I am of the view the ATIP Branch of the RCMP made no valid or proper exemption claim about which Mr. Gregory could complain to the Commissioner before seeking judicial review in this Court. The ATIP Branch of the RCMP chose to refuse access without explanation by letting the time-period lapse. No extension was accorded as contemplated by the *Privacy Act*. Now that the Privacy Commissioner's report has been delivered to Mr. Gregory, the institution cannot rely upon an unclaimed exemption for purposes of recommencing the complaint process and refusing to respond to the present Application on its merits. To permit such a process to unfold would be contrary to the objectives of efficiency and timeliness intended by the *Privacy Act* (see *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 38, [2002] 2 SCR 773).

[32] In response to the argument that the Commissioner must now be afforded the opportunity to assess the merits of the exemption claimed by the RCMP, I say, in the vernacular, that horse is already out of the barn; or, alternatively, that ship has already sailed. I am persuaded neither the *Privacy Act* nor the jurisprudence supports the proposition that an institution may sit on its hands, do nothing, wait for a deemed refusal, receive a Commissioner's report, and await the launch of judicial review proceedings, with the expectation that the process can start anew upon the making of an untimely exemption claim. Once a deemed refusal has occurred and the

Commissioner's report has been delivered to the complainant, it is not too late to provide the information sought; however, it is clearly too late to claim an exemption.

IV. Summary and Conclusion

[33] As has already been indicated, in this case, the ATIP Branch of the RCMP refused access with no explanation. A complaint was filed pertaining to the delay as well as the failure to provide the requested information. That complaint was investigated by the Privacy Commissioner. The complaint was upheld. The Privacy Commissioner advised Mr. Gregory he could seek judicial review, in the Federal Court, of the institution's refusal to provide access. Mr. Gregory did so. Then, on the eve of the judicial review hearing, the ATIP Branch of the RCMP sought to start the process anew by claiming an exemption. In my view, this exemption was untimely and does not bar this Court from considering the present Application.

[34] In the event I am incorrect regarding the application of the legal principles, nothing turns on that error given my conclusion of fact that the Privacy Commissioner's report concerned the whole of the complaint and not just the failure to respect a time-period under the *Privacy Act*. That complaint, as indicated, was highly detailed and very specific. The Commissioner's report refers to Mr. Gregory's request to the ATIP Branch of the RCMP and his detailed complaint under the *Privacy Act*. The investigation and report on the merits were completed long before the institution made any exemption claim.

[35] For these reasons, I conclude (i) the Application for Judicial Review should be converted from one under the *Federal Courts Act* to one under section 41 of the *Privacy Act*; (ii) the

Application under the *Privacy Act* is not bereft of any merit and should proceed; and (iii) the Respondent is granted an extension to July 15, 2020 to file any affidavits it intends to use on the Application.

ORDER IN T-2005-19

THIS COURT ORDERS that:

1. The Respondent's Notice of Motion to strike the within Notice of Application is dismissed;
2. The Application is converted from one under sections 18 and 18.1 of the *Federal Courts Act* to one under section 41 of the *Privacy Act*;
3. The Respondent's Notice of Motion to strike the Notice of Application under section 41 of the *Privacy Act* is dismissed;
4. The time within which the Respondent may file any affidavit(s) in response on the Application is extended to July 15, 2020; and
5. All without costs.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2005-19
STYLE OF CAUSE:	JAMIE J.GREGORY v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARDNESS

DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER:	BELL J.
DATED:	JUNE 4, 2020

IN WRITING:

Jamie J. Gregory	FOR THE PLAINTIFF
Marieke Bouchard	FOR THE DEFENDANT

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