Federal Court Cour fédérale

Date: 20210301

Dockets: T-1846-18
T-1847-18

Citation: 2021 FC 138

St. John's, Newfoundland and Labrador, March 1, 2021

PRESENT: The Honourable Madam. Justice Heneghan

Docket: T-1846-18

BETWEEN:

SUNCOR ENERGY INC.

Applicant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

Docket: T-1847-18

BETWEEN:

SUNCOR ENERGY INC

Applicant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued February 10, 2021)

I. OVERVIEW

[1] By a Notice of Application filed on October 19, 2018, in cause number T-1846-18, Suncor Energy Inc. ("the Applicant" or "Suncor") seeks judicial review of a decision made on October 4, 2018 by Mr. Trevor Bennett, Access to Information Coordinator and Resources Manager of the Canada – Newfoundland and Labrador Offshore Petroleum Board (the "Respondent" or the "Board"), pursuant to section 44 of the *Access to Information Act,* R.S.C. 1985, c. A-1 (the "Act"). The decision allows the release of certain records pursuant to Part 1 of the *Act*, in response to an access for information request.

[2] By a Notice of Application filed on October 19, 2018, in cause number T-1847-18, the Applicant seeks judicial review of another decision made by Mr. Bennett, allowing the release of certain records, together with associated correspondence, about geophysical surveys and data.

[3] Two other decisions made by Mr. Bennett, involving the Applicant, are the subject of applications for judicial review in causes number T-477-19 and T-512-19.

[4] In cause number T-1846-18, the Applicant seeks the following relief:

(a) A review of the Decision made by the C-NLOPB, per: Mr. Trevor Bennett, to release, with limited redactions, the records of the Applicant (the "Records") which contain third party information and the personal information of the Applicant's employees;

(b) An order setting aside the portion of the C-NLOPB's decision to release the Records and ordering the C-NLOPB not to disclose the Records;

(c) In the alternative to (b) above, an order setting aside the applicable portion of the Decision and ordering the Agency not to disclose the Records without redaction of all third party information and personal information of all of the Applicant's employees contained in the Records;

(d) An order that the within proceeding be held in camera, that evidence filed herein be treated as confidential and sealed by this Honourable Court, not to be made public without further Order of this Honourable Court; and

(e) Such other orders or relief that this Honourable Court considers just, including an award of costs to the Applicant.

[5] In cause number T-1847-18, the Applicant seeks the following relief:

(a) A review of the Decision made by the C-NLOPB, per: Mr. Trevor Bennett, to release, with limited redactions, the records of the Applicant (the "Records") which contain third party information and the personal information of the Applicant's employees;

(b) An order setting aside the portion of the C-NLOPB's decision to release the Records and ordering the C-NLOPB not to disclose the Records;

(c) In the alternative to (b) above, an order setting aside the applicable portion of the Decision and ordering the Agency not to disclose the Records without redaction of all third party information an personal information of all of the Applicant's employees contained in the Records;

(d) An order that the within proceeding be held in camera, that evidence filed herein be treated as confidential and sealed by this Honourable Court, not to be made public without further Order of this Honourable Court; and

> (e) Such other orders or relief that this Honourable Court considers just, including an award of costs to the Applicant.

[6] Upon motion by the Applicant for Confidentiality Orders pursuant to the *Federal Courts Rules*, S.O.R./98-106 (the "Rules"), such Orders were issued on December 10, 2018 for both causes T-1846-18 and T-1847-19.

II. BACKGROUND

[7] The decisions that are subject to these applications for judicial review were made in response to written requests for the disclosure of information.

[8] In cause number T-1846-18, the Respondent received an access to information request on September 16, 2016 for the following information:

> From 1-1-1970 to Sept 15, 2016, All (*sic*) correspondence, transmittal and similar records to and from the board related to, accompanying, and confirming the sending of any GSI seismic data and data derivatives in secondary submissions (secondary submissions as previously identified by the board) for Allowable expenditures and Work Credit reporting and data requirements.

[9] In cause number T-1847-18, the Respondent received an access to information request on August 2, 2016 for the following information:

> For the timeframe January 1, 1990 – August 1, 2016, please provide all board records and associated correspondence regarding the copying of seismic data including all correspondence, contracts, and agreements with reproduction companies.

[10] The facts and details provided below are taken from the affidavits filed by the parties, including any exhibits to such affidavits, transcripts of cross-examinations and the Tribunal material produced pursuant to Rule 317 of the Rules.

[11] In support of its Applications, the Applicant filed the affidavit of Mr. Glen Burke, dated October 31, 2019.

[12] The Respondent, in its response, filed the affidavit of Mr. Trevor Bennett, dated November 28, 2019.

[13] Both Mr. Burke and Mr. Bennett were cross-examined upon their respective affidavits.

[14] Mr. Burke is employed by the Applicant as the Commercial and Business Development Director, East Coast Canada. He provided a timeline of events and summarized the correspondence between the parties, in relation to the requests. His affidavit was filed by the Applicant in both causes T-1846-18 and T-1847-18.

[15] In his affidavit, Mr. Bennett also outlined the correspondence exchanged between the parties. He described that he conducts a simple internet search to see if the names and associations of individuals who are not government employees are publicly available. He deposed that he enters the name and association into “Google” and reviews the first page of the results.

[16] Mr. Bennett deposed that he conducted such a search in each file and he attached the results of his searches as exhibits to his affidavit.

T-1846-18

[17] On September 16, 2016, the Respondent received an access to information request for the following information:

> From 1-1-1970 to Sept 15, 2016 All correspondence, transmittal and similar records to and from the board related to, accompanying, and confirming the sending of any GSI seismic data and data derivatives in secondary submissions (secondary submissions as previously identified by the board) for Allowable expenditures and Work Credit reporting and data requirements.

[18] The Respondent notified the Applicant of this request, by letter, on October 25, 2016 and enclosed copies of the documents it identified as being responsive to the request.

[19] The documents consisted of eight letters, dated April 26, 1985 to March 22, 1989, exchanged between the Applicant and the Respondent regarding the reproduction of certain geophysical surveys and the submission of geophysical surveys by the Applicant. The letters included the names and contact information of employees of the Applicant, which is confidential information.

[20] The Applicant responded on November 10, 2016 and challenged the disclosure of the documents, as a whole, pursuant to paragraph 20(1)(d) of the Act. It also took issue with the disclosure of certain information pursuant to subsection 19(1) and paragraph 20(1)(b) of the Act. The Applicant set out the following objections:

1) It alleged that based on the nature of the request it was likely made by GSI. Because the Applicant is in negotiations with GSI, in connection with ongoing litigation, it submitted that the disclosure of the documents would interfere in those negotiations and that the information was exempt from disclosure pursuant to paragraph 20(1)(d) of the Act.

2) The Applicant also redacted information it claimed was financial, commercial, scientific or technical information it treated in a confidential manner, and claimed an exemption from disclosure pursuant to paragraph 20(1)(b) of the Act.

3) The Applicant submitted that the names and contact information of its employees were personal information and should be redacted.

4) The Applicant questioned the disclosure of certain information, which is subject to the Confidentiality Order, including the following:

   - Names, contact information and signatures of employees [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted];

   - Geographical report numbers and dates, geophysical survey types and the geographical areas covered.

5) The Applicant submitted a copy of the letters with its suggested redactions, which included confidential information.

[21] On December 1, 2016, the Respondent replied with the following position:

1) The geophysical report number 8627-P028-008Da, which was publicly available on January 3, 1992, contained the same information identified in the Applicant's November 10, 2016 response. It submitted that no information was exempt from disclosure pursuant to paragraph 20(1)(d) of the Act.

2) It also noted that where employee information can be "confirmed via the internet" it would not be withheld in the response to the request.

[22] The proposed redactions are confidential information, subject to the Confidentiality Order.

[23] In a reply dated December 1, 2016, the Respondent enclosed an audit copy of the documents which included the following redactions of confidential information:

- The name of [redacted]
- The phone number, signature and job title of [redacted]
- The signature of [redacted]
- The name and job title of [redacted]
- The name and signature of [redacted]

[24] The Applicant responded on December 13, 2016 requesting clarification on the Respondent's letter with respect to the information in the geophysical report and its paragraph 20(1)(b) submissions. It expanded on its paragraph 20(1)(b) submissions, stating that the geographical areas under consideration for exploration was sensitive commercial information. It reiterated its position on the redactions pursuant to subsection 19(1) of the Act.

[25] In reply, by letter dated December 16, 2016, the Respondent provided the Applicant a copy of excerpts of the geophysical report, which provide the same information as the eight letters in question. In response to the Applicant's paragraph 20(1)(d) submissions, the Respondent noted it was bound by the Federal Court's decision in *Geophysical Service*

Incorporated v. Canada-Newfoundland Offshore Petroleum Board and Information Commissioner of Canada (2003), 233 F.T.R. 25 (F.C.) regardless of the requestor.

[26] By letter, dated January 13, 2017, the Applicant replied with the following submissions:

> 1) That while the public geophysical report contained common references, the documents were not identical and therefore did not contain the same information. Because the context of the documents were different, they did not contain the same information, and it should be exempt from disclosure pursuant to paragraph 20(1)(d) of the Act.
>
> 2) It also submitted that the case cited by the Respondent, *Geophysical Service Incorporated, supra*, was not analogous to the situation and not applicable. It repeated its submissions on an exemption pursuant to subsection 19(1) of the Act.

[27] By letter, on April 11, 2017, the Respondent advised the Applicant that there was no evidence to show how the disclosure of the materials would interfere with its negotiations with GSI. It repeated its position about the disclosure exemptions pursuant to subsection 19(1) and paragraph 20(1)(b).

[28] On October 4, 2018, the Respondent notified the Applicant by letter, that it intended to proceed with disclosure on October 15, 2018, unless an application for judicial review were to be filed with the Federal Court. The Respondent attached a copy of the records intended for disclosure, with the same redactions as the copy sent on December 1, 2016.

[29] On August 2, 2016, the Respondent received an access to information request for the following information:

> For the timeframe January 1, 1990-August 1, 2016 please provide all board records and associated correspondence regarding the copying of seismic data including all correspondence, contracts and agreements with reproduction companies.

[30] At some point, the requester clarified that it was looking for "all records between the board and copy companies including contracts copy request forms and referrals etc...".[*sic*].

[31] The Respondent notified the Applicant of this request on October 26, 2016 and provided an opportunity a response by November 16, 2016. The Respondent enclosed documents it had identified as being relevant to the request, which it proposed to disclose. It considered the following documents to be relevant:

1) An access to information request submitted by the Applicant to the Respondent.

   This document included the name and contact information of two employees, which are confidential.

2) A letter from the Respondent to First Copy Duplicating Company asking for a quote to copy documents.

   This letter included the name and contact information of an employee, which is confidential. Please see separate bench note.

[32] In letters dated November 15, 2016, December 9, 2016, December 12, 2016, and January 11, 2017, the Applicant challenged the disclosure of certain information contained in those documents, including:

1) Personal information of its employees, including names of employees and their correspondence with the Respondent. The Applicant submitted that names of

employees, in the context of their correspondence with the Respondent, is personal information that is not publicly available and should not be disclosed pursuant to subsection 19(1) of the Act.

2) Geographical information that the Applicant claimed is of interest to it in connection with its exploration activities. The Applicant submitted that this was highly sensitive commercial information which it treats in a confidential manner, and it should be redacted pursuant to paragraph 20(1)(b) of the Act. The Applicant submitted that the request itself was confidential and not publicly available.
3) Information that could reasonably interfere with negotiations pursuant to paragraph 20(1)(d) of the Act. The Applicant claimed that the disclosure of information regarding geophysical reports it requested may prejudice its negotiations in connection with ongoing litigation with GSI.

[33] The Applicant provided copies of the documents with suggested redactions, including the names and contact information for the employees. It also submitted that the full list of requested documents in the access to information request be redacted.

[34] The Applicant did not specify which sections of the documents should be redacted pursuant to subsection 19(1) and paragraphs 20(1)(b) and 20(1)(d) of the Act.

[35] By letter on November 23, 2016, the Respondent notified the Applicant that there was insufficient information regarding its request to redact information pursuant to paragraphs

20(1)(b) and 20(1)(d) of the Act and provided an opportunity for it to submit further evidence. The Respondent also noted that where employee information can be “confirmed via the internet” it will not be withheld in the response to the request. This letter attached an audit copy of the relevant records intended for release.

[36] On November 23, 2016, the Respondent provided the Applicant with an audit copy of the records it intended to disclose. Some personal information was redacted including the phone number and email of [redacted]; the name and phone number of [redacted]; and the name, office number and phone number of [redacted].

[37] This audit copy included new redactions of information that is considered confidential. The audit copy did not redact the list of requested documents.

[38] In its replies to the Applicant, by letters dated December 12, 2016, December 16, 2016, and April 11, 2017, the Respondent set out its position, as follows:

1) The geographical information in question dealt with public information requested by the Applicant. The geographical area of the requested information covered huge areas off the east coast and it was unclear how this would prejudice the Applicant’s competitive advantage.

   The Respondent noted that the Applicant’s exploration and production activities on the east coast is public knowledge and promoted by the Applicant, including in a report that provides more detail than in the disclosed documents. The Respondent

also said that the manner in which the Applicant communicated the requests to it did not indicate an expectation of confidentiality.

2) There was no explanation as to how any of the information could be reasonably expected to interfere with the Applicant's negotiations with GSI. The Respondent also noted it was bound by the Federal Court's decision in *Geophysical Service Incorporated v. Canada-Newfoundland Offshore Petroleum Board and Information Commissioner of Canada* (2003), 233 F.T.R. 25 (F.C.).
3) Where employee contact information and their association with the Applicant can be confirmed via an internet search, it is not exempt from disclosure.
4) The Respondent indicated that the Applicant's submissions did not support an exemption under subsection 19(1) and paragraphs 20(1)(b) and 20(1)(d) of the Act.

[39] The Respondent included a copy of the access to information request, where the Applicant requested a number of geophysical reports. That request included redactions of information that it considered confidential. The only redactions were of personal information and the reports requested were not redacted.

[40] On December 14, 2016, the Applicant advised the Respondent, via email, of its intention to seek judicial review of the Respondent's decision to disclose the information in question.

[41] On October 4, 2018, the Respondent notified the Applicant, by letter, that it intended to proceed with disclosure on October 15, 2018, unless an application for judicial review were to be

filed with the Federal Court. The Respondent attached a copy of the records intended for disclosure, with the same redactions as the copy sent on November 23, 2016.

III. SUBMISSIONS

The Applicant's Submissions

[42] The Applicant argues that the records at issue in both causes T-1846-18 and T-1847-18 are exempt from disclosure pursuant to subsection 19(1), and paragraphs 20(1) and 20(1)(d) of the Act.

[43] The Applicant submits that the Respondent erred in finding that the names and contact information of its employees were not exempt from disclosure. It argues that the context of their correspondence with the Respondent, or their "Individual Involvement" in such correspondence, is personal information that is exempt from disclosure pursuant to subsection 19(1) of the Act.

[44] Relying on the decision in *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 (S.C.C.), the Applicant submits that the definition of personal information is broad and that privacy rights are paramount.

[45] The Applicant, relying on the decision in *Janssen-Ortho Inc. v. Canada (Minister of Health)* 2005 FC 1633, aff'd (2007), 367 N.R. 134 (F.C.A.), argues that the involvement of private sector employees in correspondence with the government, in this case the Respondent, constitutes "personal information" that is exempt from disclosure.

[46] The Applicant submits, as well, that there is no evidence that the employees' "Individual Involvement" was publicly available information, as addressed in subsection 19(2) of the Act. It contends that the internet searches conducted by the Respondent show names and a connection with the Applicant but not their connection with the records nor their "Individual Involvement" with the Respondent.

[47] The Applicant then argues that the record proposed to be released by the Respondent qualifies for an exemption from disclosure on the basis of the test set out in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.). In cause number T-1846-18, the Applicant seeks redaction of geographical survey information redacted pursuant to paragraph 20(1)(b) of the Act.

[48] In cause number T-1847-18, the Applicant claims that the geographical information in the records, related to its exploration activities, is highly sensitive information that it treats confidentially. It argues that this information is exempt from disclosure pursuant to paragraph 20(1)(b) of the Act.

[49] As for the benefit of the exemption against disclosure pursuant to paragraph 20(1)(d) of the Act, the Applicant relies on the evidence of Mr. Burke who deposed that the Applicant is currently engaged in litigation with Geophysical Services Inc.

The Respondent's Submissions

[50] The Respondent submits that only the name and contact information of the Applicant's employees is personal information and that this information is publicly available. It argues that the fact that an employee's "Individual Involvement", that is the fact that an employee corresponded with the Respondent, is not "personal information" but a communication of a professional, non-personal, nature. Accordingly, the Respondent argues that the prohibition against disclosure, pursuant to subsection 19(1) of the Act, does not apply.

[51] The Respondent further submits that subsection 19(2) of the Act provides discretion about the release of personal information that is publicly available. It argues that only the names and contact information about the Respondent's employees, as contained in the documents, can be described as "personal information" and this information is publicly available.

[52] The Respondent also argues that the decision in *Janssen-Ortho, supra* is distinguishable on its facts and does not apply in the present case.

[53] With respect to the Applicant's reliance upon paragraph 20(1)(b) of the Act, the Respondent submits that the Applicant bears the burden to show, with evidence, that it is entitled to rely on this provision and that it has failed to do so.

[54] With respect to cause number T-1846-18, the Respondent argues that the geophysical data is publicly available.

[55] The Respondent also submits that the information the Applicant seeks to redact is subject to subsection 119 (5) of the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act,* S.C. 1987, c.3 and after expiry of the privilege period, is public information. It argues that even if it were confidential information when submitted in the late 1980's, it is now public information.

[56] With respect to cause number T-1847-18, the Respondent submits that the geographical information at issue is not confidential. It argues that the records show that the Applicant requested publicly available geophysical reports and that these reports cover the whole of the Newfoundland and Labrador offshore are, and do not disclose commercially sensitive information. It says that the Applicant's exploration activities are publicly known and promoted by the Applicant.

[57] As for the Applicant's claim to be entitled to the benefit of the exemption in paragraph 20 (1)(d) of the Act, the Respondent argues that the Applicant has failed to provide evidence to support that contention. The Applicant relies upon the affidavit of Mr. Burke which says no more than that there is current litigation between the Applicant and Geophysical Services Incorporated, but there is no evidence that disclosure of the information would interfere with any continuing negotiations.

IV. DISCUSSION AND DISPOSITION

[58] The first issue to be addressed is the applicable standard of review.

[59] In their original written submissions, the parties argued that whether the information is exempt from disclosure pursuant to subsection 19(1) and paragraphs 20(1)(b) and 20(1)(d) of the Act is reviewable on the standard of correctness, relying on the decision in *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95.

[60] Post-hearing, the parties were given the opportunity to make further submissions about the standard of review in light of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 441 D.L.R. (4th) 1 (S.C.C.). Further submissions were filed by the Respondent on January 5, 2021 and by the Applicant on January 15, 2021.

[61] The decision in *Vavilov, supra* teaches that presumptively, the standard of reasonableness applies to administrative decision makers.

[62] However, in an application for judicial review pursuant to section 44 of the Act, the legislature has provided, in section 44.1, that a review will proceed on a *de novo* basis. Section 44.1 reads as follows:

***De novo* review**	**Révision *de novo***
44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	**44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[63] In *Vavilov, supra* the Supreme Court distinguished between *de novo* and reasonableness review, in paragraphs 83, 116 and 124, as follows:

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

…

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

…

[124] Finally, even though the task of a court conducting a reasonableness review is not to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis

> weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

[64] Here, the Supreme Court marks a distinction between a *de novo* review, where the Court "steps into the shoes" of the initial decision-maker and determines the matter on its own. It is not necessarily determining if the original decision-maker was correct or not.

[65] Upon a correctness review, the Court is asking if the first decision-maker made the "correct" decision.

[66] As noted above, the Courts have recognized correctness as the applicable standard of review for decisions involving subsection 19(1) and paragraphs 20(1)(b) and 20(1)(d) of the Act. *Vavilov*, *supra* instructs reviewing Courts to apply the standard of reasonableness except in certain limited circumstances, for example when the relevant legislation points toward the application of a different standard of review, whether correctness or a *de novo* review.

[67] *Vavilov*, *supra* also addresses the differences between review upon the correctness standard and *de novo* review.

[68] In the present circumstances, the within applications are brought pursuant to section 44 of the Act. Section 44.1 of the Act clearly provides that in such a case, the review is to proceed

upon a *de novo* basis. It is not necessary, in my opinion, to say anything more about nuanced differences between a *de novo* review and the standard of correctness.

[69] The parties submit that the exercise of discretion, pursuant to subsection 19(2) of the Act is reviewable on the standard of reasonableness. I agree; see the decision in *Canada (Information Commissioner v. Canada (Minister of Natural Resources)* (2014), 464 F.T.R. 308 (F.C.).

[70] Subsection 19(1) of the Act provides as follows:

Personal Information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.

[71] Subsection 19(2) grants exceptions to this general rule, in certain circumstances. Subsection 19(2) provides as follows:

Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Part that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où:
(a) the individual to whom it relates consents to the disclosure;	**a)** l'individu qu'ils concernent y consent;

(b) the information is publicly available; or	**b)** le public y a accès;
(c) the disclosure is in accordance with section 8 of the *Privacy Act*	**c)** la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*

[72] The Act adopts the definition of "personal information" contained in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 (the "Privacy Act"), as follows:

personal information	**renseignements personnels**
means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment:
(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	**a)** les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,	**b)** les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;
(c) any identifying number, symbol or other particular assigned to the individual,	**c)** tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

(d) the address, fingerprints or blood type of the individual,

d) son adresse, ses empreintes digitales ou son groupe sanguin;

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

(g) the views or opinions of another individual about the individual,

g) les idées ou opinions d'autrui sur lui;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant:

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment:

(i) the fact that the individual is or was an officer or employee of the government institution,

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) the title, business address and telephone number of the individual,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) the name of the individual on a document prepared by the individual

(iv) son nom lorsque celui-ci figure sur un document

in the course of employment, and

qu'il a établi au cours de son emploi,

(v) the personal opinions or views of the individual given in the course of employment,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

(j.1) the fact that an individual is or was a ministerial adviser or a member of a ministerial staff, as those terms are defined in subsection 2(1) of the *Conflict of Interest Act*, as well as the individual's name and title,

j.1) un conseiller ministériel, au sens du paragraphe 2(1) de la *Loi sur les conflits d'intérêts*, actuel ou ancien, ou un membre, actuel ou ancien, du personnel ministériel, au sens de ce paragraphe, en ce qui a trait au fait même qu'il soit ou ait été tel et à ses nom et titre;

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

(m) information about an individual who has been dead for more than twenty

m) un individu décédé depuis plus de vingt ans.(*personal information*)

years; (*renseignements personnels*)

[73] In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 (S.C.C.), the Supreme Court of Canada directed that the definition of "personal information" should be broadly interpreted.

[74] The information in issue, that is employees' names and job titles, is clearly "personal information". It falls within the definition provided in the *Privacy Act*, *supra*. It follows, then that the real question for determination is whether that information should be disclosed, upon the exercise of the discretion conferred by subsection 19(2) of the *Act*.

[75] The Applicant refers to the decision in *Janssen-Ortho, supra* as support for its argument that the Respondent erred in deciding to disclose information about the correspondence sent by its employees to the Respondent.

[76] In *Janssen-Ortho, supra*, the Federal Court found that disclosure of names of employees would also disclose information about them that was not in the public domain, including their attendance at meetings, the writing of letters and authorship of studies about removal of a drug product from the market. The Applicant argues that these findings equally apply to release of information about correspondence between its employees and the Respondent.

[77] In response, the Respondent argues that the decision in *Janssen-Ortho, supra* is distinguishable and argues that the facts in the present case are analogous to those found in

Canada (Information Commissioner) v. Canadian Transportation Accident Investigation & Safety Board 49 C.P.R. (4th) 7 ("*Nav Canada*"). The Federal Court of Appeal found, at paragraphs 54 – 55, that the Safety Board communications were not personal information because the records were professional in nature and even if they may lead to the identification of an individual, the records did not contain information about an individual.

[78] In *Husky Oil Operations Limited v. Canada – Newfoundland and Labrador Offshore Petroleum Board* (2018), 418 D.L.R. (4th) 112 (F.C.A.), the Federal Court of Appeal addressed the apparent contradiction between *Janssen-Ortho, supra* and *Nav Canada, supra*, and found that the different results were due to the different nature of the information in question. The Federal Court of Appeal observed that in *Nav Canada, supra* the records were "purely transactional and informational", while the records in *Janssen-Ortho, supra* disclosed more specific, "intimate" details about the employees' work and opinions.

[79] In *Husky, supra* the records included a request by the applicant for geophysical information and revealed nothing about the named employees "beyond the fact that the requests were made in the course of their employment".

[80] The Federal Court of Appeal applied a "purposive approach to the concept of 'personal information'" and found that the names and titles of Husky's employees, in the context of the records, were not personal information because "the records on which the employees' names are found in the case at bar, would not reveal anything intimately connected to their private life and which they might reasonably have expected to keep for themselves".

[81] In *Suncor Energy Inc. v. Canada – Newfoundland and Labrador Offshore Petroleum Board* (2018), 418 D.L.R. (4th) 144 (F.C.A.), the facts were similar to those in *Husky, supra*, and in the present case. The Federal Court of Appeal, in the reasons of Justice de Montigny, found that the "names and titles of Suncor's employees' involvement in Suncor's procurement of certain geophysical information from the Board" did not meet the definition of personal information.

[82] At paragraph 19 of *Suncor Energy, supra*, Justice de Montigny also found that is was reasonable for the respondent to disclose names pursuant to paragraph 19(2)(b) because the names and titles of the employees were publicly available on LinkedIn. The Federal Court of Appeal said that the applicant bore the burden to show that the records disclosed more about the employees than was publicly available on the internet.

[83] Writing for the majority in *Suncor Energy, supra* and *Husky, supra*, Justice Gauthier dismissed the appeals because the information was publicly available, pursuant to paragraph 19 (2) (b) and the applicant did not submit evidence to show that the information intended to be released was more than the information that was publicly available.

[84] In the present matter, the records disclose the names of employees in the context of correspondence with the Respondent.

[85] In my opinion, the fact that an individual corresponded with the Respondent in the course of employment was transactional and did not reveal personal information, as discussed in *Nav*

Canada, supra and *Husky, supra*. The Applicant's characterization of this fact as "Individual Involvement" does not change the nature of the information and does not make it personal information.

[86] The parties agree that the names and contact information of the employees are personal information. All of the employees of the Applicant in question have public LinkedIn pages showing their names and association with the Applicant. The Applicant acknowledges that this information is publicly available.

[87] In my opinion, in these circumstances and considering the relevant jurisprudence, the Respondent reasonably exercised its discretion in finding that the information contained in the records, with employees' names is publicly available and not exempt from disclosure. The fact that the individual corresponded with the Respondent is not "personal information" and the Respondent did not err in deciding to disclose this information, to disclose this publicly available information.

[88] In causes T-1846-18 and T-1847-18, the Applicant claims that the documents meet the test set out in *Air Atonabee, supra* for an exemption pursuant to paragraph 20(1)(b). That paragraph provides as follows:

Third party information	**Renseignements de tiers**
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part 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;

[89] In cause T-1846-18, the Applicant asks to have to have geographical survey information redacted, pursuant to paragraph 20(1)(b) of the Act.

[90] In cause number T-1847-18, the Applicant contends that the geographical information relative to its exploration activities, contained in the records, is highly sensitive commercial information that it treats confidentially. The Applicant claims that this information is exempt from disclosure, pursuant to paragraph 20(1)(b) of the Act.

[91] According to the decisions in *Air Atonabee, supra* and *Merck-Frosst Canada Ltd. v. Canada (Health)*, [2012] S.C.R. 23 (S.C.C.), the Applicant must satisfy all four elements in order to qualify for an exemption pursuant to paragraph 20(1)(b).

[92] Relying on the decision in *Air Atonabee, supra*, the Applicant argues that in determining if the information is "confidential", the Court must consider the following factors:

- Whether the information in a record is unavailable from sources otherwise accessible to the public or could not be obtained by observation or independent study by a member of the public acting on his own;

- That the information originate and be communicated in a reasonable expectation that it will not be disclosed;
- That the information be communicated, either pursuant to a legal requirement or voluntarily, in a relationship between a government and the supplying party that is either a fiduciary relationship or a relationship that is not contrary to the public interest, and which relationship will be fostered for the public benefit by confidential communication.

[93] The Respondent submits that there must be a reasonable expectation of privacy for the information to be considered confidential and sufficient evidence that the government also treated the information as confidential, citing the decisions in *Air Atonabee, supra* and *Bombardier Inc. v. Canada (Attorney General)*, 2019 FC 207.

[94] Further, the Respondent argues that more is required than the Applicant's assertion that it considered the information to be confidential; it must have been treated on a confidential basis by both parties and not otherwise disclosed. Here, the Respondent relies on the decisions in *Air Atonabee, supra* and *Janssen-Ortho, supra*.

[95] Meeting the burden imposed by paragraph 20(1)(b) of the Act requires evidence. In my opinion, the evidence submitted by the Applicant falls short. In the affidavit of Mr. Burke and in its written and oral submissions, the Applicant asserts that the information is confidential but its evidence does not support those assertions.

[96] Further, the evidence shows that the information intended to be disclosed by the Respondent is already publicly available, including information about geophysical surveys and data, in respect of cause number T-1846-18.

[97] Finally, there is the issue of an exemption pursuant to paragraph 20(1)(d) of the Act which provides as follows:

Third party information	**Renseignements de tiers**
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part 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 :
…	…
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	**d)** des renseignements dont la divulgation risquerait vraisemblablement d’entraver des négociations menées par un tiers en vue de contrats ou à d’autres fins.

[98] According to the decision in *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (1990), 35 F.T.R. 177 (F.C.) at paragraph 24, an exemption under this provision requires proof of a reasonable expectation that actual negotiations will be obstructed by disclosure of the information in question.

[99] Again, in my opinion, the Applicant has failed to adduce evidence to support its reliance on paragraph 20(1)(d).

[100] In his affidavit, filed by the Applicant in both causes T-1846-18 and T-1847-18, Mr. Burke deposed that the Applicant is currently engaged in litigation with Geophysical Services Incorporated. However, there is no evidence of a reasonable expectation that disclosure of that

information would interfere with any negotiations in connection with that litigation. In any event, "litigation" is not synonymous with "negotiations".

[101] In my opinion, the Applicant has failed to show that it meets the requirements to obtain an exemption against disclosure pursuant to paragraph 20(1)(d).

V. CONCLUSION

[102] In the result, the names and contact information of certain employees of the Applicant, which the Respondent proposes to disclose, is "personal information" within the scope of subsection 19(1) of the Act. However, the Respondent reasonably determined that this information is publicly available, within the meaning of paragraph 19(2)(b) of the Act, that is via LinkedIn, and reasonably exercised its discretion to disclose that information. The Applicant's submissions about "Individual Involvement" do not change the facts about public availability.

[103] The Applicant failed to meet its evidentiary burden to show its entitlement to the benefits of paragraphs 20(1)(b) and 20(1)(d) of the Act, for non-disclosure of the requested information.

[104] There is no reviewable error in the manner in which the Respondent dealt with the access requests that are the subject of the within applications for judicial review, and the applications will be dismissed with costs to the Respondent.

JUDGMENT in T-1846-18 and T-1847-18

THIS COURT'S JUDGMENT is that the applications are dismissed with costs to the Respondent.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1846-18
STYLE OF CAUSE:	SUNCOR ENERGY INC. v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
DOCKET:	T-1847-18
STYLE OF CAUSE:	SUNCOR ENERGY INC. v. CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	AUGUST 11, 2020
JUDGMENT AND REASONS:	HENEGHAN J.
CONFIDENTIAL JUDGMENT AND REASONS ISSUED:	FEBRUARY 10, 2021
PUBLIC JUDGMENT AND REASONS ISSUED:	MARCH 1, 2021

APPEARANCES:

J. Alexander Templeton	FOR THE APPLICANT
Amy M. Crosbie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnis Cooper Barristers and Solicitors St. John's, Newfoundland and Labrador	FOR THE APPLICANT
Curtis Dawe	FOR THE RESPONDENT

Barristers and Solicitors
St. John's, Newfoundland and
Labrador